No. 17-9560	
Title:	**Hamid Mohamed Ahmed Ali Rehaif, Petitioner** **v.** **United States**
Docketed:	June 26, 2018
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(16-15860-AA)
Decision Date:	March 26, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jun 21 2018	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 26, 2018) **Petition** **Motion for Leave to Proceed in Forma Pauperis** **Proof of Service**
Jul 03 2018	Waiver of right of respondent United States to respond filed. **Main Document**
Jul 12 2018	DISTRIBUTED for Conference of 9/24/2018.
Jul 24 2018	Response Requested. (Due August 23, 2018)
Aug 10 2018	Motion to extend the time to file a response from August 23, 2018 to September 24, 2018, submitted to The Clerk. **Main Document**
Aug 13 2018	Motion to extend the time to file a response is granted and the time is extended to and including September 24, 2018.
Sep 17 2018	Motion to extend the time to file a response from September 24, 2018 to October 24, 2018, submitted to The Clerk. **Main Document**
Sep 18 2018	Motion to extend the time to file a response is granted and the time is further extended to and including October 24, 2018.
Oct 24 2018	Brief of respondent United States in opposition filed. **Proof of Service** **Main Document**
Nov 07 2018	Reply of petitioner Hamid Rehaif filed. (Distributed)

	Main Document **Proof of Service**
Nov 08 2018	DISTRIBUTED for Conference of 11/30/2018.
Dec 03 2018	DISTRIBUTED for Conference of 12/7/2018.
Dec 20 2018	DISTRIBUTED for Conference of 1/4/2019.
Jan 07 2019	DISTRIBUTED for Conference of 1/11/2019.
Jan 11 2019	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jan 31 2019	Letter informing Clerk of joint briefing schedule agreed upon by parties. Petitioner will file the joint appendix and petitioner's brief on the merits on or before February 22, 2019. Respondent will file respondent's brief on the merits on or before Monday, March 25, 2019. **Main Document**
Feb 07 2019	Blanket Consent filed by Petitioner, Hamid Rehaif. **Blanket Consent** **Proof of Service**
Feb 11 2019	SET FOR ARGUMENT on Tuesday, April 23, 2019
Feb 22 2019	Brief of petitioner Hamid Rehaif filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 22 2019	Motion to dispense with printing the joint appendix filed by petitioner Hamid Rehaif. **Main Document** **Proof of Service**
Mar 01 2019	Brief amicus curiae of National Immigrant Justice Center filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 01 2019	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 20 2019	CIRCULATED
Mar 21 2019	Record requested from the U.S.C.A. 11th Circuit.
Mar 25 2019	Brief of respondent United States filed. (Distributed) **Main Document** **Proof of Service**
Mar 28 2019	Record from the U.S.C.A. 11th Circuit is electronic and located on Pacer.

Apr 01 2019	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Apr 01 2019	Brief amicus curiae of Everytown for Gun Safety filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 12 2019	Reply of petitioner Hamid Rehaif filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 23 2019	Argued. For petitioner: Rosemary T. Cakmis, Orlando, Fla. For respondent: Allon Kedem, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Jun 21 2019	Judgment REVERSED and case REMANDED. Breyer, J., delivered the **opinion** of the Court, in which Roberts, C. J., and Ginsburg, Sotomayor, Kagan, Gorsuch, and Kavanaugh, JJ., joined. Alito, J., filed a dissenting opinion, in which Thomas, J., joined.

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No. _____

In The
Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal law, persons of various statuses are prohibited from "possess[ing] in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g). One such status is being an alien "illegally or unlawfully in the United States." 18 U.S.C. § 922(g)(5)(A).

The penalty for violating § 922(g) is found in 18 U.S.C. § 924, which provides "Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined, . . . imprisoned, . . . or both. 18 U.S.C. § 924(a)(2).

The question presented is:

Whether the "knowingly" provision of § 924(a)(2) applies to both the possession and status elements of a § 922(g) crime, as has been urged by then-Judge, now Justice Gorsuch, or whether it applies only to the possession element, as has been held by the courts.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Hamid Mohamed Ahmed Ali Rehaif, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's initial opinion was published at *United States v. Rehaif*, 868 F.3d 907 (11th Cir. 2017) (Pet. App. 21a). After a petition for rehearing en banc was filed, the Eleventh Circuit *sua sponte* vacated its published opinion and substituted a revised opinion, also published. *See United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (Pet. App. 1a). The petition for rehearing was then denied as moot (Pet. App. 38a).

JURISDICTION

The Eleventh Circuit issued its revised opinion on March 26, 2018. *See* Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 922(g)(5) of Title 18 provides, in relevant part:

> It shall be unlawful for any person . . . who, being an alien . . . is illegally or unlawfully in the United States . . . to . . . possess in or affecting commerce, any firearm or ammunition.

Section 924(a)(2) of Title 18 provides:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10

years, or both.

STATEMENT OF THE CASE

1. Mr. Rehaif is a citizen of the United Arab Emirates. Doc. 108 at 175; Doc. 73-5 (Exhibit 3A). In July 2013, Mr. Rehaif applied for and was granted admission to Florida Institute of Technology (FIT) as a student. Doc. 108 at 186-87. He attended school at FIT during the Fall 2013, Spring 2014, and Fall 2014 semesters. Doc. 73-9 (Exhibit 5); Doc. 108 at 219-21. On January 21, 2015, an email was sent from FIT to Mr. Rehaif notifying him that he had been "academically dismissed" from FIT and that his "immigration status will be terminated on February 5, 2015 unless you transfer out before that date, or you notify our office that you have already left the United States." Doc. 73-7 (Exhibit 4A); Doc. 73-8 (Exhibit 4B); Doc. 108 at 218-19. According to the Department of Homeland Security's foreign student database, the termination of Mr. Rehaif's status became official on February 23, 2015. Pet. App. 3a; *see* Doc. 73-10 (Exhibit 6); Doc. 108 at 222-24.

2. On December 2, 2015, Mr. Rehaif went to a shooting range in Melbourne, Florida. Pet. App. 3a; *see* Doc. 109 at 38-43, 45; Doc. 73-14 (Exhibit 10A). He purchased a box of ammunition and rented a firearm for one hour of shooting. Doc. 109 at 50-52; Doc. 73-17 (Exhibit 11). On December 8, 2015, law enforcement responded to a suspicious person report at the hotel where Mr. Rehaif was staying. An FBI agent spoke with Mr. Rehaif, who acknowledged he had been at a shooting

range and had a box of ammunition in his hotel room. Pet. App. 3a-4a; *see* Doc. 109 at 97-100. Based on the above facts, an indictment charged that Mr. Rehaif, an alien illegally and unlawfully in the United States, knowingly possessed, in and affecting interstate and foreign commerce, a firearm on December 2, 2015 (Count One), and ammunition on December 8, 2015 (Count Two), both in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). Doc. 13.

3. The case proceeded to trial. In its proposed jury instructions, the government requested an instruction: "The United States is not required to prove that the defendant knew that he was illegally or unlawfully in the United States." Pet. App. 4a; Doc. 53 at 33. Mr. Rehaif opposed the request, arguing that the United States had to prove both that he had knowingly possessed a firearm and that he had known of his prohibited status – that he was illegally or unlawfully in the United States when he had possessed the firearm. The district court overruled Mr. Rehaif's objection. Pet. App. 4a-5a; *see* Doc. 53 at 33-34; Doc. 100 at 19.

The district court instructed the jury on the elements of the offense as follows:

> For you to find the Defendant guilty, the government must prove each of the following beyond a reasonable doubt:
>
> • the Defendant knowingly possessed a firearm (Count One) and/or ammunition (Count Two) in or affecting interstate or foreign commerce; and
>
> • before possessing the firearm and/or ammunition, the Defendant was an alien illegally or unlawfully in the United States.

Doc. 69 at 11. The court further instructed: "The United States is not required to prove that the Defendant knew that he was illegally or unlawfully in the United States. *Id.* at 16. The jury found Mr. Rehaif guilty on both charges. Doc. 71. He was sentenced to imprisonment for a term of 18 months on each account, to run concurrent. Doc. 85. After serving his sentence, Mr. Rehaif was deported back to his homeland.

4. On appeal, Mr. Rehaif argued that the phrase "knowingly violates," in 18 U.S.C. § 924(a)(2), modifies § 922(g) to require proof that the defendant knew at the time that he possessed the firearm that he was in the United States illegally or unlawfully. Pet. App. 6a. The district court's contrary jury instruction thus misstated the law and eviscerated Mr. Rehaif's planned defense, which was that he did not know he was in the United States illegally or unlawfully. Pet. App. 6a. Mr. Rehaif relied primarily on the partially concurring opinion by Judge Phillips in *United States v. Langley*, 62 F.3d 602, 608 (4th Cir. 1995), *see* Initial Brief of Appellant at 12-16 (filed December 27, 2016), and the concurrence by then-Judge, now Justice Gorsuch in *United States v. Games–Perez*, 667 F.3d 1136, 1142 (10th Cir. 2012) (Gorsuch, J., concurring in judgment), *see* Reply Brief of Appellant at 4-10 (filed February 23, 2017); *see also United States v. Games-Perez*, 695 F.3d 1104, 1116 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc).

5. The Eleventh Circuit rejected Judge Gorsuch's opinion that the plain

terms of § 922(g) and § 924(a)(2) constituted "a perfectly clear law as it is written, plain in its terms, straightforward in its application." Pet. App. 10a (quoting *Games-Perez*, 667 F.3d at 1145 (Gorsuch, J., concurring in judgment)). The court also found its prior precedent rule bound it to conclude that "the government need not prove that the defendant knew of his prohibited status." Pet. App. 11a-12a (citing *United States v. Jackson*, 120 F.3d 1226 (11th Cir. 1997)). The court discussed legislative history to buttress its conclusions. Pet. App. 12a-14a. The court also explained why it thought this case constituted an exception to the general rule that the government must prove *mens rea* for each substantive element of the crime, reasoning that "the government did not have the burden of proving that the defendant knew a specific fact or detail about himself." Pet. App. 14a-17a.

REASONS FOR GRANTING THE WRIT

I. This Court should grant review to determine whether § 924(a)(2)'s "knowingly violates" provision applies equally to the possession and status elements of a § 922(g) violation, an issue that affects thousands of defendants each year.

Section 922(g) of Title 18, United States Code, prohibits certain categories of persons from possessing a firearm or ammunition in interstate commerce. The most common prohibited status is that of a convicted felon. *See* 18 U.S.C. § 922(g)(1). Other prohibited statuses include fugitives from justice, unlawful users of any controlled substance, persons committed to a mental institution, persons convicted of a misdemeanor crime of domestic, and, as relevant here, "an alien"

"illegally or unlawfully in the United States." §§ 922(g)(2)-(5), (9). Section 924(a)(2), in turn, delineates the penalty for anyone who "knowingly violates" § 922(g). 18 U.S.C. § 924(a)(2).

By its terms, the "knowingly violates" provision in § 924(a)(2) is not limited to just knowledge of possession of the firearm or ammunition. A plain reading of the statutes shows that the "knowingly violates" provision should apply equally to the possession and status elements of a § 922(g) crime.[1]

Petitioner acknowledges that, thus far, "no circuit has required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g)." Pet. App. 13a. The better view, however, advocated by some judges, is that the government should have to prove a defendant knew about his prohibited status for a § 922(g) offense. *See United States v. Games-Perez*, 667 F.3d 1136 (10th Cir. 2012) (Gorsuch, J., concurring in judgment); *United States v. Games-Perez*, 695 F.3d 1104 (10th Cir. 2012) (Mem) (Gorsuch, J., dissenting from denial of rehearing en banc); *United States v. Ford*, 821 F.3d 63, 71 (1st Cir. 2016) ("a good

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[1] The knowledge requirement does not apply to the third element of a section 922(g) violation – the "interstate or foreign commerce" element – since knowledge of jurisdictional facts is not generally an element of the required intent under federal statutes. *See Torres v. Lynch*, 136 S. Ct. 1319, 1331 (2016) ("courts have routinely held that a criminal defendant need not know of a federal crime's interstate commerce connection to be found guilty" because "Congress viewed the commerce element as distinct from, and subject to a different rule than, the elements describing the substantive offense.").

argument can be made that the government actually does need to prove, in a case against the principal under section 922(g)(1), the principal's knowledge of his prior conviction"); *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995) (Phillips, J., joined by three other judges, concurring in part and dissenting in part). The issue has never been addressed by this Court. Review should be granted to consider this important issue, which affects thousands of defendants each year.[2]

The starting point when construing a statute is the language of the statute. "As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citations and internal quotation marks omitted). The Court has instructed "time and again," that courts presume Congress "says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citing cases). Courts "are not at liberty to rewrite the statute to reflect a meaning we deem more desirable." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008). Courts must instead "give effect to the text Congress enacted." *Id.* "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not

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[2] There were 8,064 firearms cases in fiscal year 2017. U.S.S.C. *Overview of Federal Criminal Cases – Fiscal Year 2017* at 3. More than half of firearms cases (57.1%) involved the illegal possession of a firearm by a prohibited person, usually a convicted felon. *Id.* at 10.

absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citation and internal quotation marks omitted).

The text of the statutes at issue here is unambiguously clear and so should require that the "knowingly violates" language of section 924(a)(2) be applied to both substantive elements of a 922(g) violation: (1)the possession of a firearm **and** (2) the status that makes a person's possession illegal (here that Mr. Rehaif was "illegally or unlawfully in the United States"). In *Games-Perez*, Judge Gorsuch concurred because of binding prior 10th Circuit precedent holding that proof of a prohibited status was not an element of a § 922(g) offense.[3] He explained why this result is wrong.

Judge Gorsuch identified the three elements of a section 922(g)(1) violation, the statute at issue there, as: (1) the defendant was previously convicted of a felony, (2) the defendant later possessed a firearm, and (3) the possession was in or affecting interstate commerce. 667 F.3d at 1143 (Gorsuch, J., concurring in judgment). He criticized *Capps* for reading the word "knowingly" as "leapfrogging over the very first § 922(g) element and touching down only at the second" because that interpretation "defies linguistic sense—and not a little grammatical gravity." *Id.* "Ordinarily," Judge Gorsuch explained, when a criminal statute

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[3] 667 F.3d at 1142-43 (citing *United States v. Capps*, 77 F.3d 350 (10th Cir. 1996)).

introduces the elements of a crime with the word "knowingly," that word is applied to each element of the crime. *Id.* (citing *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009)).

Judge Gorsuch acknowledged that statutory *mens rea* requirements do not always apply to "jurisdictional" elements like the final, interstate commerce element in § 922(g) [*see* note 1, *supra*], but explained that:

> Congress gave us three elements in a particular order. And it makes no sense to read the word "knowingly" as so modest that it might blush in the face of the very first element only to regain its composure and reappear at the second.

667 F.3d at 1144.

Judge Gorsuch opined that following the statutory text "would simply require the government to prove that the defendant knew of his prior felony conviction. And there's nothing particularly strange about that." *Id.* at 1145. He thought it "hardly crazy to think that in a § 922(g)(1) prosecution Congress might require the government to prove that the defendant had knowledge of the only fact (his felony status) separating criminal behavior from not just permissible, but constitutionally protected, conduct." *Id.* "In fact," Judge Gorsuch continued, "this result isn't just plausible, it is presumptive. The Supreme Court has long held that courts should 'presum[e]' a *mens rea* requirement attaches to 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Id.* (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)). He wondered: "How can it be

that courts elsewhere read a *mens rea* requirement *into* statutory elements criminalizing otherwise lawful conduct, yet when Congress expressly imposes just such a *mens rea* requirement in §§ 922(g) and 924(a) we turn around and read it *out* of the statute?" *Id.* Judge Gorsuch could find "no good explanation" for this "topsy turvy result." *Id.* Judge Gorsuch concluded his concurrence:

> I recognize that precedent compels me to join the court's judgment. But candor also compels me to suggest that we might be better off applying the law Congress wrote than the one *Capps* hypothesized. It is a perfectly clear law as it is written, plain in its terms, straightforward in its application. Of course, if Congress wishes to revise the plain terms of § 922(g) and § 924(a), it is free to do so anytime. But there is simply no right or reason for this court to be in that business.

Id. at 1145-46.

A petition for rehearing en banc in *Games-Perez* was denied by a 6 to 4 vote. *United States v. Games-Perez*, 695 F.3d 1104, 1104-05, 1116-17 (10th Cir. 2012). Judge Gorsuch dissented, writing that "reading Congress's *mens rea* requirement as leapfrogging over the first statutorily specified element and touching down only at the second listed element—defies grammatical gravity and linguistic logic." *Id.* at 1117 (Gorsuch, J., dissenting from denial of rehearing en banc). He reiterated that, ordinarily, introducing the elements of a crime with the word "knowingly" means that *mens rea* requirement must apply to all of the ensuing substantive elements of the crime. *Id.* (citing *Flores–Figueroa*, 556 U.S. at 650).

Judge Gorsuch's conclusion: "[T]he *law* before us that survived the gauntlet of bicameralism and presentment couldn't be plainer. By their express terms, §§ 922(g) and 924(a)(2) do not authorize the government to imprison [persons] unless and until the government can show they *knew* of their felon status at the time of the alleged offense." 695 F.3d at 1118.

Even if there was somehow an ambiguity in the "plain statutory text," Judge Gorsuch identified "another intractable problem" – this Court's presumption that a *mens rea* requirement attaches to each of the statutory elements that criminalize otherwise innocent conduct. *Id.* at 1119 (citing, among other cases, *X-Citement Video* and *Morisette v. United State*s, 342 U.S. 246 (1952)). Judge Gorsuch concluded on the merits of imposing a *mens rea* requirement:

> Together §§ 922(g) and 924(a)(2) operate to criminalize the possession of any kind of gun. But gun possession is often lawful and sometimes even protected as a matter of constitutional right. The *only* statutory element separating innocent (even constitutionally protected) gun possession from criminal conduct in §§ 922(g) and 924(a) is a prior felony conviction. So the presumption that the government must prove *mens rea* here applies with full force.

Id.

Everything Judge Gorsuch said in his *Games-Perez* opinions applies equally here, the only difference being that the statutory element separating innocent gun possession from criminal conduct is Mr. Rehaif's status of being illegally or unlawfully present in the United States rather than his status as a convicted felon.

Review is warranted.

II. This case is an excellent vehicle for considering this important issue.

Whether § 924(a)(2)'s "knowingly violates" provision applies to the prohibited status element of a § 922(g) offense was fully litigated in the district court and on appeal to the 11th Circuit, which addressed the issue on the merits.

Moreover, properly instructing the jury may have made a difference in the outcome of the case as Mr. Rehaif had a viable defense that he did not know of his prohibited status. While an email was sent from FIT to Mr. Rehaif notifying him that he had been "academically dismissed" from FIT and that his "immigration status will be terminated," there was no attempt by FIT to confirm that Mr. Rehaif had received the emails. Doc. 108 at 233. Nor was there any attempt to talk with Mr. Rehaif on the telephone, or to set up a meeting with him. *Id.* at 233-34. Mr. Rehaif did not respond to either email. *Id.* at 218-19.

Further, while an FBI agent testified that he interviewed Mr. Rehaif and that Mr. Rehaif admitted he knew he was out of status for his immigration because he was not in school, the interview was not recorded and the other two law enforcement agents present for the interview did not testify. Doc. 109 at 99-101.

With a jury properly instructed that the government had to prove Mr. Rehaif knew he was in the United States unlawfully or illegally, then, Mr. Rehaif could have plausibly argued that he did not know of his prohibited status because (1) he

did not receive the emails from FIT, and (2) the FBI agent who testified was not credible. Petitioner respectfully seeks this Court's review.

III. The decision below is wrong.

The Eleventh Circuit attempted to downplay Judge Gorsuch's opinion in *Games-Perez* by pointing out that he acknowledged the "knowingly" requirement of § 924(a)(2) does not apply to the "interstate commerce" element of § 922(g). Pet. App. 10. Thus, the court reasoned, "[t]he plain text of the statutes does not require that the defendant 'know' every detail outlined in § 922(g)," and so Judge Gorsuch's concurrence only showed that the statutory language was not "perfectly clear" and resort to other tools of statutory construction was necessary. Pet. App. 10a-11a.

The Eleventh Circuit was wrong. The power and logic of Judge Gorsuch's textual reading is not at all diminished by the fact that courts uniformly do not require proof of knowledge of an interstate commerce nexus. Courts have long distinguished between substantive and jurisdictional elements of federal crimes. "[T]he substantive elements of a federal statute describe the evil Congress seeks to prevent; the jurisdictional element connects the law to one of Congress's enumerated powers, thus establishing legislative authority." *Torres*, 136 S. Ct. at 1630.

While both kinds of elements must be proven to a jury beyond a reasonable

doubt, "they are not created equal for every purpose." *Id.* Courts generally "interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every [substantive] element of an offense," but the same is not true of jurisdictional elements. *Id.* ("[T]he existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.") (quoting *United States v. Feola*, 420 U.S. 671, 677, n.9 (1975)).

Here, unlike the requirement that the gun at issue have moved in interstate commerce, the requirement that Mr. Rehaif be an alien "illegally or unlawfully in the United States" when he possessed the firearm and ammunition is undoubtedly substantive. In fact, it is the only element that makes his conduct illegal. It is lawful to possess a gun that has moved in interstate commerce. It is lawful to go to a shooting range and rent a gun to shoot there, and to purchase ammunition. The only thing that makes such conduct illegal, under § 922(g)(5)(A), is if the person happens to be illegally or unlawfully in the United States at the time.

Because the plain language of the statute is clear, the Eleventh Circuit's ensuing discussion of legislative history is unnecessary. Pet. App. 12a-14a.

The court's comparison to the strict liability common law crimes of statutory rape and bigamy, Pet. App. 14a-15a, is inapt because Congress, by enacting § 924(a)(2), specifically requires a person to "knowingly" violate § 922(g) before

punishment can be imposed for that violation.

Finally, the court below points to cases from this Court where proof of defendant's knowledge of *his own status* was not required. Pet. App. 15a-17a (emphasis in original). The obvious reason for those cases not requiring proof of the defendant's own status is that the defendant's status in those cases was not an element of the crime. The opposite is true here. The plain language of § 924(a)(2) requires a defendant to "knowingly" violate § 922(g), and one of the elements of a § 922(g) case is that the defendant, as charged here, be "an alien . . . illegally or unlawfully in the United States," or, as is more often charged, that the defendant be a convicted felon, or that he comes within any of the several other statuses that prohibit possession of a firearm or ammunition. *See* § 922(g).[4]

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[4] The Eleventh Circuit's assertion that "defendant's knowledge of his own status offers little room for 'reasonable mistake,'" Pet. App. 17a, is belied by the facts of this case. As discussed above, the planned defense was that Mr. Rehaif did not know he was an alien "illegally or unlawfully in the United States" and thus legally unable to possess firearms or ammunition, and that defense was viable given the facts of the case.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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Appendix

Decision Below
(Revised Opinion filed March 26, 2018)

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15860

D. C. Docket No. 6:16-cr-00003-JA-DAB-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAMID MOHAMED AHMED ALI REHAIF,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(March 26, 2018)

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and DUBINA, Circuit Judges.

DUBINA, Circuit Judge:

We *sua sponte* vacate our prior published opinion, *United States v. Rehaif*, 868 F.3d 907 (11th Cir. 2017), and substitute this revised opinion in lieu thereof.

Hamid Mohamed Ahmed Ali Rehaif ("Rehaif"), a citizen of the United Arab Emirates, appeals his convictions for possessing a firearm and ammunition while being illegally or unlawfully in the United States, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). Rehaif argues that the district court erred by instructing the jury that the government did not have to prove that he knew he was in the United States unlawfully. Rehaif further argues that the district court abused its discretion by failing to instruct the jury that an alien is not unlawfully in the United States until the U.S. Citizenship and Immigration Services ("USCIS") or an immigration judge has declared him unlawfully present. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we affirm the convictions.

I. BACKGROUND

The United States issued Rehaif an F-1 nonimmigrant student visa to study mechanical engineering at the Florida Institute of Technology ("FIT") on the condition that he pursue a full course of study—except as otherwise authorized by a "Designated School Official" —or engage in training following graduation. When applying for his F-1 student visa, Rehaif signed a Certificate of Eligibility for Nonimmigrant Student Status, certifying that he agreed to comply with the

terms and conditions of his admission and that he sought "to enter or remain in the United States temporarily, and solely for the purpose of pursuing a full course of study."

After three semesters at FIT, Rehaif was academically dismissed on December 17, 2014. One month later, on January 21, 2015, FIT sent Rehaif an email stating that he had been academically dismissed and that his "immigration status will be terminated on February 5, 2015, unless you transfer out before that date, or you notify our office that you have already left the United States." Rehaif did not take any action. As such, according to the Department of Homeland Security's foreign student database, Rehaif's status was officially terminated on February 23, 2015.

On December 2, 2015, Rehaif went to a shooting range. He purchased a box of ammunition and rented a firearm for one hour. Videos from the shooting range show Rehaif firing two different firearms. The firearms were manufactured in Austria and then imported into the United States through Georgia. The ammunition was manufactured in Idaho.

Six days later, an employee at the Hilton Rialto Hotel in Melbourne, Florida, called the police to report that a guest at the hotel—Rehaif—had been acting suspiciously. Special Agent Tom Slone with the Federal Bureau of Investigation went to the hotel to speak with Rehaif. Rehaif admitted, in an unrecorded

interview, that he had fired two firearms at the shooting range and that he was aware that his student visa was out of status because he was no longer enrolled in school. Rehaif consented to a search of his hotel room, where the agents found the remaining ammunition that he had purchased at the shooting range.

A federal grand jury charged Rehaif with two counts of violating § 922(g)(5)(A). That statute provides that:

> (g) It shall be unlawful for any person —
> . . .
> (5) who, being an alien —
> (A) is illegally or unlawfully in the United States . . .
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition. . . .

18 U.S.C. § 922(g)(5)(A). Section 922(g) does not itself provide for any punishment. That gap is filled by § 18 U.S.C. § 924(a)(2), which states that:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(a)(2).

Before trial, both parties submitted proposed jury instructions to the district court. During the charge conference, the government requested an instruction stating that "[t]he United States is not required to prove that the defendant knew that he was illegally or unlawfully in the United States." Rehaif disagreed, arguing that the United States had to prove both that he had knowingly possessed a firearm and that he had known of his prohibited status–that he was illegally or unlawfully

in the United States when he had possessed the firearm. The district court overruled Rehaif's objection.

The government also requested an instruction stating that "[t]he alien's presence becomes unlawful upon the date of the status violation." Rehaif, on the other hand, proposed an instruction stating that "[a] person admitted to the United States on a student visa does not become unlawfully present until an Immigration Officer or an Immigration Judge determines that [he] ha[s] violated [his] student status." The district court gave an instruction closer to the government's request, telling the jury that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law." Rehaif then perfected this appeal, challenging the district court's jury instructions with respect to the "knowingly" requirement and the "illegal or unlawful" requirement, as well as the constitutionality of §922.[1]

II. STANDARD OF REVIEW

This court will review the district court's jury instructions "*de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." *United States v. James*, 642 F.3d 1333, 1337 (11th Cir. 2011) (quotation omitted).

[1] Rehaif argues that 18 U.S.C. § 922(g) is unconstitutional, both facially and as applied, because it has too attenuated a connection to interstate commerce. This argument is foreclosed by circuit precedent. *See United States v. Wright*, 607 F.3d 708, 715-16 (11th Cir. 2010); *United States v. Scott*, 263 F.3d 1270, 1271-74 (11th Cir. 2001).

III. ANALYSIS

On appeal, Rehaif challenges the district court's jury instructions regarding the "knowingly" requirement and the "illegal or unlawful" requirement.

With respect to the "knowingly" requirement, Rehaif argues that the district court erred by instructing the jury that the government need not prove that he knew he was in the United States illegally or unlawfully, because the phrase "knowingly violates," in 18 U.S.C. § 924(a)(2), modifies § 922(g) to require proof that the defendant knew at the time that he possessed the firearm that he was in the United States illegally or unlawfully. Rehaif further argues that, although several courts have ruled that knowledge of one's status as a convicted felon is not necessary for a conviction under § 922(g)(1), the question of whether knowledge is necessary for a conviction under § 922(g)(5)(A) is not settled. As such, Rehaif argues, the district court's jury instruction misstated the law and eviscerated his planned defense that he did not know he was in the United States illegally or unlawfully.

The government argues that a violation of § 922(g) only requires that the defendant knowingly possessed a firearm, not that the defendant had knowledge of his status, and that nothing in the statute indicates that § 922(g)(5)(A) has a different mens rea requirement. For support, the government points to the fact that no circuit has required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g). The government also argues that § 922(g)

consolidates previously separate sections that did not contain mens rea provisions but that had been interpreted to require knowledge of the firearm possession, and that Congress did not intend to expand the mens rea requirement when it consolidated the statutes.

With respect to the "illegal or unlawful" requirement, Rehaif argues that federal immigration law defines "unlawful presence" as presence in the United States after the expiration of the period of stay authorized by the Attorney General. This definition, he argues, supports his position that a person is not unlawfully in the United States until a USCIS official or an immigration judge declares him to be so. Additionally, Rehaif argues that both his position and the government's position have a basis in case law or statute and that the ambiguity in the statute requires the application of the rule of lenity.

The government responds that, although this court has not addressed this issue, five other circuits have held that an alien who is permitted to remain in the United States only for the duration of his status becomes illegally or unlawfully in the United States under § 922(g)(5)(A) upon the violation of his status. Therefore, Rehaif became unlawfully in the United States the moment he failed to comply with the conditions of his F-1 visa. The government also argues that the case Rehaif cites to support his position does not state that an alien only becomes illegally or unlawfully present when a USCIS officer or immigration judge

determines that he has violated his status. Moreover, the government argues that because the statute is not grievously ambiguous, the rule of lenity does not apply.

In short, we are left with two questions: (1) what does "knowingly" modify; and (2) what does "illegally or unlawfully" mean? Each argument will be addressed in turn.

A. "Knowingly"

Under 18 U.S.C. § 922(g), persons falling within particular categories are prohibited from possessing any firearm or ammunition that has been transported in interstate commerce. To successfully prosecute a defendant under § 922(g), the government must prove three elements: (1) the defendant falls within one of the categories listed in the § 922(g) subdivisions ("the status element"); (2) the defendant possessed a firearm or ammunition ("the possession element"); and (3) the possession was "in or affecting [interstate or foreign] commerce." *See* 18 U.S.C. § 922(g). By its own terms, § 922(g) does not have a mens rea requirement; instead, the applicable mens rea is set out by § 924(a)(2), which provides that "[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. § 924(a)(2). It is undisputed that the mens rea requirement applies to the possession element—that Rehaif "knowingly possessed" the firearm. *See United States v. Winchester*, 916 F.2d 601, 604 (11th Cir. 1990). At issue is whether the

"knowingly" requirement also applies to the status element—that Rehaif knows he is an alien "illegally or unlawfully in the United States." 18 U.S.C. § 922(g)(5)(A).

As Rehaif points out, the strongest argument in favor of requiring proof of mens rea with respect to the status element is laid out in then-Judge, now Justice Gorsuch's concurrence in *United States v. Games-Perez*. 667 F.3d 1136, 1142 (10th Cir. 2012) (Gorsuch, J., concurring in judgment). Acknowledging that prior precedent dictated that the mens rea requirement does not apply to the status element, then-Judge Gorsuch concluded that the plain language of the statute compelled the opposite conclusion. *Id.* ("[Prior precedent] reads the word "knowingly" as leapfrogging over the very first § 922(g) element and touching down only at the second. This interpretation defies linguistic sense—and not a little grammatical gravity."). In drawing such a conclusion, then-Judge Gorsuch noted that, "Congress gave us three elements in a particular order. And it makes no sense to read the word 'knowingly' as so modest that it might blush in the face of the very first element only to regain its composure and reappear at the second." *Id.* at 1144. He also pointed out that "[t]he Supreme Court has long held that courts should presum[e] a mens rea requirement attaches to each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 1145 (quotations omitted) (alteration in original).

While then-Judge Gorsuch opined that § 922(g) "is a perfectly clear law as it is written, plain in its terms, straightforward in its application," *id.*, there is evidence to suggest otherwise. The fact that § 924(a)(2) only punishes defendants who "knowingly violate" § 922(g) begs the question "what does it mean to knowingly violate the statute?" Does the statute proscribe merely conduct, or both conduct and the surrounding circumstances that make the conduct a federal crime? *See United States v. Langley*, 62 F.3d 602, 613 (4th Cir. 1995) (en banc) (Phillips, J., concurring in part and dissenting in part) *cert. denied*, 516 U.S. 1083, 116 S. Ct. 797 (1996). Indeed, then-Judge Gorsuch acknowledged that the term "knowingly" in § 924(a)(2) does not apply to *every* provision of § 922(g), *Games-Perez*, 667 F.3d at 1144, for § 922(g) requires the "firearm or ammunition [to have] been shipped or transported in interstate or foreign commerce," and the Supreme Court has repeatedly explained that "the existence of [a] fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act." *Torres v. Lynch*, 136 S. Ct. 1619, 1631 (2016) (quoting *United States v. Feola*, 420 U.S. 671, 676 n.9, 95 S. Ct. 1255, 1260 n. 9 (1975)). The plain text of the statutes does not require that the defendant "know" every detail outlined in § 922(g). At most, then-Judge Gorsuch's concurrence serves to illustrate that the language of § 922 and § 924(a)(2) is not "perfectly clear," and that other tools of

interpretation must be employed to ascertain whether a mens rea requirement attaches to the status element.

In *United States v. Jackson*, we resolved the issue of whether "knowingly" applies to the status element of § 922(g).[2] 120 F.3d 1226 (11th Cir. 1997). *Jackson* involved § 922(g)(1), which is identical to § 922(g)(5)(A), except that it proscribes gun possession by felons, as opposed to possession by those illegally or unlawfully in this country. *Compare* 18 U.S.C. § 922(g)(1), *with* § 922(g)(5)(A). Much like Rehaif, the defendant in *Jackson* argued that "the district court erroneously instructed the jury that it was not necessary for [him] to know that he had been convicted of a felony" to find him guilty of violating § 922(g)(1). *Jackson,* 120 F.3d at 1229. Relying on cases from the Fourth and Fifth Circuits, this court held that the government need not prove that the defendant knew of his prohibited status. *See id.* (citing *Langley*, 62 F.3d at 604–06 (majority opinion); *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir.1988)). We our bound by this decision "[u]nder our prior precedent rule, [which requires us] to follow a binding precedent in this Circuit unless and until it is overruled by this court en banc or by

[2] This court has not specifically addressed the illegal-alien prohibited status of § 922(g)(5)(A), but we have recognized that "each subdivision of subsection (g) differs only in its requirement that the offender have a certain "status under the law." *Winchester*, 916 F.2d at 605 (quotations omitted). Not only would it be bizarre for two § 922(g) subdivisions to have different mens rea requirements, but also, there is nothing in the text or history of § 922 to support such deviation.

the Supreme Court." *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (internal quotation and citation omitted).

Additionally, there is a longstanding uniform body of precedent holding that the government does not have to satisfy a mens rea requirement with respect to the status element of § 922. "The predecessor statutes to § 922(g)[]" that forbade felons to transport, receive, or possess firearms "contained no mens rea requirement," leading courts "interpreting these processor statutes [to] require[] . . . proof that the defendant knowingly received, transported, or possessed a firearm." *Langley*, 62 F.3d at 604 (internal quotation and citation omitted). "[B]ut, at the same time, [these decisions] recognized that the defendant's knowledge of the weapon's interstate nexus or of his felon status was irrelevant." *Id.* (internal quotation and citation omitted). True, in 1986, Congress amended § 924(a) to require "knowing" violations of § 922(g). *Id.*; *see also* Pub. L. No. 99–308, § 104(a), 100 Stat. 449, 456 (1986). But this codification did not compel a new interpretation. Although "a *significant change* in [statutory] language" ordinarily "is presumed to entail a change in meaning," ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 256 (2012) (emphasis added), the addition of a mens rea *identical* to that already imposed by courts does not suggest a change in meaning. Although defendants pointed to this change as evidence that the government must prove "that the defendant knew not only that he

possessed a firearm but that it had an interstate nexus and that he was a felon," *Dancy*, 861 F.2d at 81, courts routinely rejected these arguments, *See, e.g.*, *id.* at 81–82; *Langley*, 62 F.3d 604–06; *Jackson*, 120 F.3d 1226. And no court of appeals has required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g).[3]

Moreover, despite ample opportunity to do so, Congress has never revisited the issue.[4] "The long time failure of Congress to alter [the law] after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488, 60 S. Ct. 982, 989 (1940); *see also Kimble v. Marvel*

[3] *See United States v. Smith*, 940 F.2d 710, 713-14 (1st Cir. 1991) (felony conviction, § 922(g)(1)); *United States v. Huet*, 665 F.3d 588, 596 (3d Cir. 2012) (same); *Langley*, 62 F.3d at 606 (same); *United States v. Butler*, 637 F.3d 519, 524-25 (5th Cir. 2011) (dishonorable discharge, § 922(g)(6)); *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003) (felony conviction, § 922(g)(1)); *United States v. Stein*, 712 F.3d 1038, 1041 (7th Cir. 2013) (misdemeanor domestic violence conviction, § 922(g)(9)); *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999) (felony conviction, § 922(g)(1)); *United States v. Kafka*, 222 F.3d 1129, 1131 (9th Cir. 2000) (domestic violence restraining order, § 922(g)(8)); *United States v. Games-Perez*, 667 F.3d 1136, 1140 (10th Cir. 2012) (majority opinion) (felony conviction, § 922(g)(1)); *United States v. Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008) (same).

[4] As the Fourth Circuit explained in *Langley*, "[t]he predecessor statutes to § 922(g)(1) contained no mens rea requirement. However, cases interpreting these predecessor statutes made clear that these statutes required proof of a mens rea element and were not strict liability offenses; that is, courts required proof that 'the defendant knowingly received, transported, or possessed a firearm,' but, at the same time, recognized that 'the defendant's knowledge of the weapon's interstate nexus or of his felon status was irrelevant.' " 62 F.3d at 604 (citing *Dancy*, 861 F.2d at 81). We presume that when Congress enacted the Firearms Owners' Protection Act of 1986, establishing § 922(g), and its subsequent amendments, it was aware of this history. *See White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997) ("Congress is assumed to act with the knowledge of existing law and interpretations when it passes new legislation.").

Entm't, LLC, 135 S. Ct. 2401, 2409–10 (2015) ("All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects. . . . Congress's continual reworking of the patent laws . . . further supports leaving the decision in place."). Indeed, after appellate courts confirmed that the mens rea requirement of § 924 applied only to the possession element of offenses under § 922, Congress *expanded* the scope of § 922(g) without revisiting § 924(a)(2). In 1996—after the decisions in *Dancy* and *Langley*—Congress extended the prohibition on firearm possession to individuals "who ha[ve] been convicted in any court of a misdemeanor crime of domestic violence." Pub. L. No. 104–208, § 658, 110 Stat. 3009, 372 (1996) (codified at § 922(g)(9)).

Although it may seem that failing to require proof that the defendant had the requisite knowledge with respect to the status element is at odds with the traditional rule that the government must prove mens rea for each substantive element of the crime, upon closer inspection, even at common law and early American law, the government did not have the burden of proving that the defendant knew a specific fact or detail about himself. Two examples illustrate this point: statutory rape and bigamy. In the instance of statutory rape, while there may be issues of proof with respect to the victim's age, the government does not

have to prove that the defendant knew he was the age of majority. *See, e.g.*, *State v. Running*, 208 N.W. 231, 233–34 (N.D. 1926) (requiring that the government prove the defendant's age–but not that he knew his age–to establish the degree of statutory rape); *Hall v. State*, 58 N.W. 929, 930 (Neb. 1894) (requiring that an information charging statutory rape charge that the defendant was over 18, but not that he knew he was over 18). Similarly, with respect to bigamy, the government does not have to prove that the defendant knew he was married. *See* G.A. Endlich, *The Doctrine of Mens Rea*, 13 CRIM. L. MAG. 831, 841–42 (1891). In short, even traditional crimes have never required the defendant's knowledge of the status element. [5]

That the Supreme Court has repeatedly underscored a "presumption in favor of a scienter requirement [for] . . . each of the statutory elements that criminalize otherwise innocent conduct," *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S. Ct 464, 469 (1994); *see also Torres*, 136 S. Ct. at 1630 ("In general, courts interpret criminal statutes to require that a defendant possess a mens rea, or guilty mind, as to every element of an offense."), does not change the conclusion that the government need not prove that the defendant knew *his own status*, even when this status is what brings the defendant within the ambit of a criminal law. Instead, precedents on this point require only that the government prove mens rea

[5] Of course, there could be a mistake of fact defense–but such defense is not alleged here.

for elements of an offense that concern the characteristics of *other people* and *things*. For example, in *Staples v. United States*, the Supreme Court explained that the government could secure a conviction under a statute that forbade the possession of automatic firearms only if it could prove that the defendant "knew" that the gun he possessed was capable of automatic fire in addition to proving that the defendant knowingly possessed the gun. 511 U.S. 600, 602–03, 619, 114 S. Ct. 1793, 1795–96 (1994). In *X-Citement Video*, the Supreme Court interpreted a statute that forbade the "knowing" transportation, receipt, or distribution of "visual depiction[s] involv[ing] the use of a minor engaging in sexually explicit conduct" to require the government to prove that the defendant knew that the depiction in question featured a minor, and not just that the defendant knowingly possessed the depiction. 513 U.S. at 68, 78, 115 S. Ct. at 467, 472 (internal quotation and citation omitted). In *Flores-Figueroa v. United States*, the Supreme Court explained that a statute that forbade a person from "knowingly transfer[ing], possess[ing], or us[ing] . . . *a means of identification of another person*" required the government to prove that the defendant knew that the identification belonged to another person, and not just that the defendant knowingly used the identification. 556 U.S. 646, 647, 129 S. Ct. 1886, 1888 (2009) (internal citation and quotation omitted). And in *Posters 'N' Things, Ltd. v. United States*, the Supreme Court interpreted a statute that forbade the sale of drug paraphernalia to require the

government to prove that the defendant "knew that the items at issue [were] likely to be used with illegal drugs." 511 U.S. 513, 524, 114 S. Ct. 1747, 1753 (1994). But we are aware of no precedent that requires the government to prove that the defendant knew of his own status. To the contrary, the Supreme Court has suggested that the "presumption of mens rea" for an element of an offense carries far less force when there is little "opportunity for reasonable mistake" about that element. *X-Citement Video*, 513 U.S. at 72 n. 2, 115 S. Ct. at 469 n. 2. A defendant's knowledge of his own status offers little room for "reasonable mistake." *Id.*

Finally, as the Fourth Circuit held in *Langley*,

> Our conclusion that Congress did not intend, through [Firearms Owners' Protection Act of 1986] to place the additional evidentiary burdens on the government suggested by Langley is supported by several other considerations. First, it is highly unlikely that Congress intended to make it easier for felons to avoid prosecution by permitting them to claim that they were unaware of their felony status and/or the firearm's interstate nexus. Second, in light of Congress' repeated efforts to fight violent crime and the commission of drug offenses, it is unlikely that Congress intended to make the application of the enhancement provision contained in § 924(e)(1) more difficult to apply.

Id. at 606 (footnote omitted).

Textual support, prior precedent, congressional acquiescence, and analogous common law all support the conclusion that there is no mens rea requirement with respect to the status element of § 922(g). Therefore, we conclude that the district court did not err when it gave the jury instruction stating that "[t]he government is

not required to prove that the defendant knew that he was illegally or unlawfully in the United States."

B. "Illegally or unlawfully"

While this court has never addressed at what point an alien becomes illegally or unlawfully in the United States for purposes of § 922(g)(5)(A), Rehaif's argument that an alien does not become illegal until he has been adjudicated as such by an USCIS official or an immigration judge fails for four reasons.

First, the district court's instruction– that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law"–is more consistent with the plain text of § 922(g)(5)(A). *See* Unlawful, Black's Law Dictionary (10th ed. 2014) (defining "unlawful" as "[n]ot authorized by law").

Second, as the Tenth Circuit explained in *United States v. Atandi*, "Congress has proven quite capable of demonstrating the circumstances in which it intended federal firearms disabilities to hinge upon the result of an adjudication." 376 F.3d 1186 (10th Cir. 2004). Other § 922(g) subdivisions refer to, for example, a person "who is subject to a court order[ed]" restraining order, or to a person "who has been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(8)–(9); *Atandi*, 376 F.3d at 1188. If Congress had intended for § 922(g)(5)(A) to depend on a decisionmaker's adjudication, it would have so stated.

Atandi, 376 F.3d at 1188 (citing *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983)).

Third, the Immigration and Nationality Act's ("INA") definition of "unlawful" is consistent with the district court's instruction. The INA prohibits the admission of aliens who have been unlawfully present in the United States for certain periods of time. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I). The INA states that "[f]or purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States *after the expiration of the period of stay authorized* by the Attorney General. . . ." INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii) (emphasis added). As such, a student admitted under an F-1 visa is unlawfully present if he remains in the United States after he is no longer enrolled as a full-time student. *See* 8 C.F.R. § 214.2(f)(5)(i) (defining duration of status as "the time during which an F-1 student is pursuing a full course of study at an educational institution approved by the [USCIS] for attendance by foreign students, or engaging in authorized practical training following completion of studies."); *see also* 27 C.F.R. § 478.11 (defining unlawful as "any alien . . . [w]ho is a nonimmigrant and whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted.").

Finally, the rule of lenity does not apply because § 922(g)(5)(A)'s plain text is not ambiguous. *See Johnson v. U.S.*, 529 U.S. 694, 713 n.13, 120 S. Ct. 1795, 1807 n.13 (2000) ("Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved"). Furthermore, even if we found § 922(g)(5)(A) ambiguous, the ambiguity is resolved by the definition provided by 27 C.F.R. § 478.11, which was promulgated in 1997. *See* 62 Fed. Reg. 34,634, 34,639 (June 27, 1997). The rule of lenity is not applicable where a longstanding, unambiguous regulation gives potential offenders fair notice of what is proscribed. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 704 n.18, 115 S. Ct. 2407, 2416 n.18 (1995).

Therefore, we conclude the district court did not err when it instructed the jury that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law."

IV. CONCLUSION

For the aforementioned reasons, we affirm Rehaif's convictions.

AFFIRMED.

Initial Opinion
(filed August 17, 2017)

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15860

D. C. Docket No. 6:16-cr-00003-JA-DAB-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAMID MOHAMED AHMED ALI REHAIF,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 17, 2017)

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and DUBINA, Circuit Judges.

DUBINA, Circuit Judge:

Hamid Mohamed Ahmed Ali Rehaif ("Rehaif"), a citizen of the United Arab Emirates, appeals his convictions for possessing a firearm and ammunition while being illegally or unlawfully in the United States, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). Rehaif argues that the district court erred by instructing the jury that the government did not have to prove that he knew he was in the United States unlawfully. Rehaif further argues that the district court abused its discretion by failing to instruct the jury that an alien is not unlawfully in the United States until the U.S. Citizenship and Immigration Services ("USCIS") or an immigration judge has declared him unlawfully present. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we affirm the convictions.

I. BACKGROUND

The United States issued Rehaif an F-1 nonimmigrant student visa to study mechanical engineering at the Florida Institute of Technology ("FIT") on the condition that he pursue a full course of study–except as otherwise authorized by a "Designated School Official"–or engage in training following graduation. When applying for his F-1 student visa, Rehaif signed a Certificate of Eligibility for Nonimmigrant Student Status, certifying that he agreed to comply with the terms and conditions of his admission and that he sought "to enter or remain in the

United States temporarily, and solely for the purpose of pursuing a full course of study."

After three semesters at FIT, Rehaif was academically dismissed on December 17, 2014. One month later, on January 21, 2015, FIT sent Rehaif an email stating that he had been academically dismissed and that his "immigration status will be terminated on February 5, 2015, unless you transfer out before that date, or you notify our office that you have already left the United States." Rehaif did not take any action. As such, according to the Department of Homeland Security's foreign student database, Rehaif's status was officially terminated on February 23, 2015.

On December 2, 2015, Rehaif went to a shooting range. He purchased a box of ammunition and rented a firearm for one hour. Videos from the shooting range show Rehaif firing two different firearms. The firearms were manufactured in Austria and then imported into the United States through Georgia. The ammunition was manufactured in Idaho.

Six days later, an employee at the Hilton Rialto Hotel in Melbourne, Florida, called the police to report that a guest at the hotel–Rehaif–had been acting suspiciously. Special Agent Tom Slone with the Federal Bureau of Investigation went to the hotel to speak with Rehaif. Rehaif admitted, in an unrecorded interview, that he had fired two firearms at the shooting range and that he was

aware that his student visa was out of status because he was no longer enrolled in school. Rehaif consented to a search of his hotel room, where the agents found the remaining ammunition that he had purchased at the shooting range.

A federal grand jury charged Rehaif with two counts of violating § 922(g)(5)(A). That statute provides that:

> (g) It shall be unlawful for any person —
> . . .
> (5) who, being an alien —
> (A) is illegally or unlawfully in the United States . . .
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition. . . .

18 U.S.C. § 922(g)(5)(A). Section 922(g) does not itself provide for any punishment. That gap is filled by § 18 U.S.C. § 924(a)(2), which states that:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(a)(2).

Before trial, both parties submitted proposed jury instructions to the district court. During the charge conference, the government requested an instruction stating that "[t]he United States is not required to prove that the defendant knew that he was illegally or unlawfully in the United States." Rehaif disagreed, arguing that the United States had to prove both that he had knowingly possessed a firearm and that he had known of his prohibited status–that he was illegally or unlawfully

in the United States when he had possessed the firearm. The district court overruled Rehaif's objection.

The government also requested an instruction stating that "[t]he alien's presence becomes unlawful upon the date of the status violation." Rehaif, on the other hand, proposed an instruction stating that "[a] person admitted to the United States on a student visa does not become unlawfully present until an Immigration Officer or an Immigration Judge determines that [he] ha[s] violated [his] student status." The district court gave an instruction closer to the government's request, telling the jury that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law." Rehaif then perfected this appeal, challenging the district court's jury instructions with respect to the "knowingly" requirement and the "illegal or unlawful" requirement, as well as the constitutionality of §922.[1]

II. STANDARD OF REVIEW

This court will review the district court's jury instructions "*de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." *United States v. James*, 642 F.3d 1333, 1337 (11th Cir. 2011) (quotation omitted).

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[1] Rehaif argues that 18 U.S.C. § 922(g) is unconstitutional, both facially and as applied, because it has too attenuated a connection to interstate commerce. This argument is foreclosed by circuit precedent. *See United States v. Wright*, 607 F.3d 708, 715-16 (11th Cir. 2010); *United States v. Scott*, 263 F.3d 1270, 1271-74 (11th Cir. 2001).

III. ANALYSIS

On appeal, Rehaif challenges the district court's jury instructions regarding the "knowingly" requirement and the "illegal or unlawful" requirement.

With respect to the "knowingly" requirement, Rehaif argues that the district court erred by instructing the jury that the government need not prove that he knew he was in the United States illegally or unlawfully, because the phrase "knowingly violates," in 18 U.S.C. § 924(a)(2), modifies § 922(g) to require proof that the defendant knew at the time that he possessed the firearm that he was in the United States illegally or unlawfully. Rehaif further argues that, although several courts have ruled that knowledge of one's status as a convicted felon is not necessary for a conviction under § 922(g)(1), the question of whether knowledge is necessary for a conviction under § 922(g)(5)(A) is not settled. As such, Rehaif argues, the district court's jury instruction misstated the law and eviscerated his planned defense that he did not know he was in the United States illegally or unlawfully.

The government argues that a violation of § 922(g) only requires that the defendant knowingly possessed a firearm, not that the defendant had knowledge of his status, and that nothing in the statute indicates that § 922(g)(5)(A) has a different mens rea requirement. For support, the government points to the fact that no circuit has required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g). The government also argues that § 922(g)

consolidates previously separate sections that did not contain mens rea provisions but that had been interpreted to require knowledge of the firearm possession, and that Congress did not intend to expand the mens rea requirement when it consolidated the statutes.

With respect to the "illegal or unlawful" requirement, Rehaif argues that federal immigration law defines "unlawful presence" as presence in the United States after the expiration of the period of stay authorized by the Attorney General. This definition, he argues, supports his position that a person is not unlawfully in the United States until a USCIS official or an immigration judge declares him to be so. Additionally, Rehaif argues that both his position and the government's position have a basis in case law or statute and that the ambiguity in the statute requires the application of the rule of lenity.

The government responds that, although this court has not addressed this issue, five other circuits have held that an alien who is permitted to remain in the United States only for the duration of his status becomes illegally or unlawfully in the United States under § 922(g)(5)(A) upon the violation of his status. Therefore, Rehaif became unlawfully in the United States the moment he failed to comply with the conditions of his F-1 visa. The government also argues that the case Rehaif cites to support his position does not state that an alien only becomes illegally or unlawfully present when a USCIS officer or immigration judge

determines that he has violated his status. Moreover, the government argues that because the statute is not grievously ambiguous, the rule of lenity does not apply.

In short, we are left with two questions: (1) what does "knowingly" modify; and (2) what does "illegally or unlawfully" mean? Each argument will be addressed in turn.

A. "Knowingly"

Under 18 U.S.C. § 922(g), persons falling within particular categories are prohibited from possessing any firearm or ammunition that has been transported in interstate commerce. To successfully prosecute a defendant under § 922(g), the government must prove three elements: (1) the defendant falls within one of the categories listed in the § 922(g) subdivisions ("the status element"); (2) the defendant possessed a firearm ("the possession element"); and (3) that the possession was "in or affecting [interstate or foreign] commerce." *See* 18 U.S.C. § 922(g). By its own terms, § 922(g) does not have a mens rea requirement; instead, the applicable mens rea is set out by § 924(a)(2), which provides that "[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. § 924(a)(2). It is undisputed that the mens rea requirement applies to the possession element–that Rehaif "knowingly possessed" the firearm. *See United States v. Winchester*, 916 F.2d 601, 604 (11th Cir. 1990). At issue is whether the "knowingly" requirement

also applies to the status element–that Rehaif knows he is an alien "illegally or unlawfully in the United States." 18 U.S.C. § 922(g)(5)(A).

As Rehaif points out, the strongest argument in favor of requiring proof of mens rea with respect to the status element is laid out in then-Judge, now Justice Gorsuch's concurrence in *United States v. Games-Perez*. 667 F.3d 1136, 1142 (10th Cir. 2012) (Gorsuch, J., concurring in judgment). Acknowledging that prior precedent dictated that the mens rea requirement does not apply to the status element, then-Judge Gorsuch concluded that the plain language of the statute compelled the opposite conclusion. *Id.* ("[Prior precedent] reads the word "knowingly" as leapfrogging over the very first § 922(g) element and touching down only at the second. This interpretation defies linguistic sense—and not a little grammatical gravity."). In drawing such a conclusion, then-Judge Gorsuch noted that, "Congress gave us three elements in a particular order. And it makes no sense to read the word "knowingly" as so modest that it might blush in the face of the very first element only to regain its composure and reappear at the second." *Id.* at 1144. He also pointed out that "[t]he Supreme Court has long held that courts should presum[e] a mens rea requirement attaches to each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 1145 (quotations omitted) (alteration in original).

While then-Judge Gorsuch opined that § 922(g) "is a perfectly clear law as it is written, plain in its terms, straightforward in its application," *id.*, there is evidence to suggest otherwise. The fact that § 924(a)(2) only punishes defendants who "knowingly violate" § 922(g) begs the question "what does it mean to knowingly violate the statute?" Does the statute proscribe merely conduct, or both conduct and the surrounding circumstances that make the conduct a federal crime? *See United States v. Langley*, 62 F.3d 602, 613 (4th Cir. 1995) (en banc) (Phillips, J., concurring in part and dissenting in part) *cert. denied*, 516 U.S. 1083, 116 S. Ct. 797 (1996). While the defendant's status might be inextricably tied to the violation, the actual violation occurs when the defendant knowingly possesses a firearm.

Moreover, although the Supreme Court has instructed us to presume a mens rea requirement attaches to statutory elements that criminalize innocent conduct, *see United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S. Ct. 464, 469 (1994), the status element of § 922(g) does not involve innocent conduct. Indeed, the only innocent conduct that § 922(g) does criminalize is the possession of a gun, and the mens rea requirement attaches to the possession element. At most, then-Judge Gorsuch's concurrence serves to illustrate that the language of § 922 and § 924(a)(2) is not "perfectly clear," and that other tools of interpretation must be

employed to ascertain whether a mens rea requirement attaches to the status element.

In *United States v. Jackson*, we resolved the issue of whether "knowingly" applies to the status element of § 922(g).[2] 120 F.3d 1226 (11th Cir. 1997). *Jackson* involved § 922(g)(1), which is identical to § 922(g)(5)(A), except that it proscribes gun possession by felons, as opposed to possession by those illegally or unlawfully in this country. *Compare* 18 U.S.C. § 922(g)(1), *with* § 922(g)(5)(A). Much like Rehaif, the defendant in *Jackson* argued that "the district court erroneously instructed the jury that it was not necessary for [him] to know that he had been convicted of a felony" to find him guilty of violating § 922(g)(1). *Jackson,* 120 F.3d at 1229. Relying on cases from the Fourth and Fifth Circuits, this court held that the government need not prove that the defendant knew of his prohibited status. *See id.* (citing *Langley*, 62 F.3d at 604-606 (majority opinion); *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir.1988)).

Additionally, there is a longstanding uniform body of precedent holding that the government does not have to satisfy a mens rea requirement with respect to the status element. No court of appeals has required proof of the defendant's

[2] This court has not specifically addressed the illegal-alien prohibited status of § 922(g)(5)(A), but we have recognized that "each subdivision of subsection (g) differs only in its requirement that the offender have a certain "status under the law." *Winchester*, 916 F.2d at 605 (quotations omitted). Not only would it be bizarre for two § 922(g) subdivisions to have different mens rea requirements, but also, there is nothing in the text or history of § 922 to support such deviation.

knowledge of his prohibited status under any subsection of § 922(g).[3] Moreover, despite ample opportunity to do so, Congress has never revisited the issue.[4] "The long time failure of Congress to alter [the law] after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488, 60 S. Ct. 982, 989 (1940); *see also Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-10 (2015) ("All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects. . . .

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[3] *See United States v. Smith*, 940 F.2d 710, 713-14 (1st Cir. 1991) (felony conviction, § 922(g)(1)); *United States v. Huet*, 665 F.3d 588, 596 (3d Cir. 2012) (same); *Langley*, 62 F.3d at 606 (same); *United States v. Butler*, 637 F.3d 519, 524-25 (5th Cir. 2011) (dishonorable discharge, § 922(g)(6)); *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003) (felony conviction, § 922(g)(1)); *United States v. Stein*, 712 F.3d 1038, 1041 (7th Cir. 2013) (misdemeanor domestic violence conviction, § 922(g)(9)); *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999) (felony conviction, § 922(g)(1)); *United States v. Kafka*, 222 F.3d 1129, 1131 (9th Cir. 2000) (domestic violence restraining order, § 922(g)(8)); *United States v. Games-Perez*, 667 F.3d 1136, 1140 (10th Cir. 2012) (majority opinion) (felony conviction, § 922(g)(1)); *United States v. Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008) (same).

[4] As the Fourth Circuit explained in *Langley*, "[t]he predecessor statutes to § 922(g)(1) contained no mens rea requirement. However, cases interpreting these predecessor statutes made clear that these statutes required proof of a mens rea element and were not strict liability offenses; that is, courts required proof that 'the defendant knowingly received, transported, or possessed a firearm,' but, at the same time, recognized that 'the defendant's knowledge of the weapon's interstate nexus or of his felon status was irrelevant.' " 62 F.3d at 604 (citing *Dancy*, 861 F.2d at 81). We presume that when Congress enacted the Firearms Owners' Protection Act of 1986, establishing § 922(g), and its subsequent amendments, it was aware of this history. *See White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997) ("Congress is assumed to act with the knowledge of existing law and interpretations when it passes new legislation.").

Congress's continual reworking of the patent laws . . . further supports leaving the decision in place.").

Although it may seem that failing to require proof that the defendant had the requisite knowledge with respect to the status element is at odds with the traditional rule that the government must prove mens rea for each substantive element of the crime, upon closer inspection, even at common law and early American law, the government did not have the burden of proving that the defendant knew a specific fact or detail about himself. Two examples illustrate this point: statutory rape and bigamy. In the instance of statutory rape, while there may be issues of proof with respect to the victim's age, the government does not have to prove that the defendant knew he was the age of majority. *See, e.g., State v. Running*, 208 N.W. 231, 233-34 (N.D. 1926) (requiring that the government prove the defendant's age–but not that he knew his age–to establish the degree of statutory rape); *Hall v. State*, 58 N.W. 929, 930 (Neb. 1894) (requiring that an information charging statutory rape charge that the defendant was over 18, but not that he knew he was over 18). Similarly, with respect to bigamy, the government does not have to prove that the defendant knew he was married. *See* G.A. Endlich, *The Doctrine of Mens Rea*, 13 CRIM. L. MAG. 831, 841-42 (1891). In short, even

traditional crimes have never required the defendant's knowledge of the status element.[5]

Finally, as the Fourth Circuit held in *Langley*,

> Our conclusion that Congress did not intend, through [Firearms Owners' Protection Act of 1986] to place the additional evidentiary burdens on the government suggested by Langley is supported by several other considerations. First, it is highly unlikely that Congress intended to make it easier for felons to avoid prosecution by permitting them to claim that they were unaware of their felony status and/or the firearm's interstate nexus. Second, in light of Congress' repeated efforts to fight violent crime and the commission of drug offenses, it is unlikely that Congress intended to make the application of the enhancement provision contained in § 924(e)(1) more difficult to apply.

Id. at 606 (footnote omitted).

Textual support, prior precedent, congressional acquiescence, and analogous common law all support the conclusion that there is no mens rea requirement with respect to the status element of § 922(g). Therefore, we conclude that the district court did not err when it gave the jury instruction stating that "[t]he government is not required to prove that the defendant knew that he was illegally or unlawfully in the United States."

B. "Illegally or unlawfully"

While this court has never addressed at what point an alien becomes illegally or unlawfully in the United States for purposes of § 922(g)(5)(A), Rehaif's

[5] Of course, there could be a mistake of fact defense–but such defense is not alleged here.

argument that an alien does not become illegal until he has been adjudicated as such by an USCIS official or an immigration judge fails for four reasons.

First, the district court's instruction– that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law"–is more consistent with the plain text of § 922(g)(5)(A). *See* Unlawful, Black's Law Dictionary (10th ed. 2014) (defining "unlawful" as "[n]ot authorized by law").

Second, as the Tenth Circuit explained in *United States v. Atandi*, "Congress has proven quite capable of demonstrating the circumstances in which it intended federal firearms disabilities to hinge upon the result of an adjudication." 376 F.3d 1186 (10th Cir. 2004). Other § 922(g) subdivisions refer to, for example, a person "who is subject to a court order[ed]" restraining order, or to a person "who has been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(8)–(9); *Atandi*, 376 F.3d at 1188. If Congress had intended for § 922(g)(5)(A) to depend on a decisionmaker's adjudication, it would have so stated. *Atandi*, 376 F.3d at 1188 (citing *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983)).

Third, the Immigration and Nationality Act's ("INA") definition of "unlawful" is consistent with the district court's instruction. The INA prohibits the admission of aliens who have been unlawfully present in the United States for

certain periods of time. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I). The INA states that "[f]or purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States *after the expiration of the period of stay authorized* by the Attorney General. . . ." INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii) (emphasis added). As such, a student admitted under an F-1 visa is unlawfully present if he remains in the United States after he is no longer enrolled as a full-time student. *See* 8 C.F.R. § 214.2(f)(5)(i) (defining duration of status as "the time during which an F-1 student is pursuing a full course of study at an educational institution approved by the [USCIS] for attendance by foreign students, or engaging in authorized practical training following completion of studies."); *see also* 27 C.F.R. § 478.11 (defining unlawful as "any alien . . . [w]ho is a nonimmigrant and whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted.").

Finally, the rule of lenity does not apply because § 922(g)(5)(A)'s plain text is not ambiguous. *See Johnson v. U.S.*, 529 U.S. 694, 713 n.13, 120 S. Ct. 1795, 1807 n.13 (2000) ("Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved"). Furthermore, even if we found § 922(g)(5)(A) ambiguous, the ambiguity is resolved by the definition provided by 27 C.F.R. § 478.11, which was promulgated in 1997. *See* 62 Fed. Reg. 34,634, 34,639 (June

27, 1997). The rule of lenity is not applicable where a longstanding, unambiguous regulation gives potential offenders fair notice of what is proscribed. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 n.18, 115 S. Ct. 2407, 2416 n.18 (1995).

Therefore, we conclude the district court did not err when it instructed the jury that "[a]n alien illegally or unlawfully in the United States is an alien whose presence within the United States is forbidden or not authorized by law."

IV. CONCLUSION

For the aforementioned reasons, we affirm Rehaif's convictions.

AFFIRMED.

Order denying petition for
rehearing en banc as moot

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15860-AA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAMID MOHAMED AHMED ALI REHAIF,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 17, 2017)

ON PETITION FOR REHEARING

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and DUBINA, Circuit Judges.

PER CURIAM:

Having considered Rehaif's petition for rehearing en banc, we conclude that it is due to be denied as moot. On March 26, 2018, while the petition was pending, we vacated our opinion in this case and substituted a new one. See United States v. Rehaif, __ F.3d __, 2018 WL 1465527 (11th Cir. March 26, 2018). Because a new opinion containing substantial revisions has been issued, Rehaif's petition is due to be denied as moot. See Fed. R. App. P. 35, I.O.P. 4; see also Cadet v. Fla. Dep't of Corrs., 853 F.3d 1216, 1218, 1248 (11th Cir. 2017) (concluding that issuance of a substantially revised opinion meant the petition for rehearing en banc had effectively been mooted).

If he wishes to do so Rehaif may file a petition for panel rehearing and/or for rehearing en banc addressing the substituted new opinion of the Court if he wishes to do so. See Cadet, 853 F.3d at 1248 ("Because new opinions have been issued, the parties are free to file petitions for rehearing and for rehearing en banc addressing this decision of the Court . . . if they wish to do so."); Int'l Caucus of Labor Comms. v. City of Montgomery, 111 F.3d 1548, 1556 (11th Cir. 1997) (same). We extend the deadline for filing that petition to 21 days from the issuance of this order. See Fed. R. App. P. 35, 40; 11th Cir. R. 35-2, 40-3.

The petition for rehearing en banc is DENIED AS MOOT.

No. 17-9560

IN THE SUPREME COURT OF THE UNITED STATES

HAMID MOHAMED AHMED ALI REHAIF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a prosecution for possession of a firearm and ammunition by an alien who is unlawfully present in the United States, in violation of 18 U.S.C. 922(g)(5), the government must prove that the person who knowingly possessed a firearm also knew that he was unlawfully in the United States.

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 888 F.3d 1138.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2018. The petition for a writ of certiorari was filed on June 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on

two counts of possession of a firearm and ammunition by an alien who is unlawfully in the United States, in violation of 18 U.S.C. 922(g)(5) and 924(a)(2). Judgment 1. The district court sentenced petitioner to 18 months of imprisonment and two years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-20a.

1. In July 2013, petitioner, a citizen of the United Arab Emirates, received an F-1 nonimmigrant student visa to study mechanical engineering at the Florida Institute of Technology (FIT). Pet. App. 2a. After three semesters at FIT, petitioner was academically dismissed. Id. at 3a. On January 21, 2015, FIT sent petitioner an email informing him of his dismissal and stating that his "immigration status will be terminated on February 5, 2015" unless he transferred institutions or voluntarily departed the United States before that date. Ibid. Petitioner took no action, and the Department of Homeland Security terminated his status on February 23, 2015. Ibid.

On December 2, 2015, petitioner visited a shooting range in Melbourne, Florida. Pet. App. 3a. While there, he purchased a box of ammunition and fired two guns, one of which he rented for one hour. Ibid. Both of the firearms that petitioner used were manufactured in Austria before importation to the United States through Georgia; the ammunition was manufactured in Idaho. Ibid.

On December 8, 2015, an employee at the Melbourne hotel where petitioner was staying called the police to report that petitioner was acting suspiciously. Pet. App. 3a. An FBI agent followed up on the tip and interviewed petitioner. Ibid. During their conversation, petitioner admitted to the agent that he had fired two firearms at the shooting range and that he was aware that his student visa had expired. Id. at 3a-4a. Petitioner consented to a search of his hotel room, which turned up the remaining ammunition that petitioner had purchased at the shooting range six days earlier. Id. at 4a.

2. A grand jury in the Middle District of Florida indicted petitioner on two counts of possession of a firearm or ammunition by an alien who is unlawfully in the United States, in violation of 18 U.S.C. 922(g)(5) and 924(a)(2). Indictment 1-2. Section 922(g)(5) prohibits "an alien * * * illegally or unlawfully in the United States" from possessing a firearm or ammunition that has traveled in interstate commerce. 18 U.S.C. 922(g)(5)(A). Pursuant to 18 U.S.C. 924(a)(2), "[w]hoever knowingly violates" Section 922(g) "shall be fined as provided in this title, imprisoned not more than 10 years, or both."

At trial, the government asked the district court to instruct the jury that "[t]he United States is not required to prove that the defendant knew he was illegally or unlawfully in the United States." D. Ct. Doc. 53, at 33 (May 3, 2016). Petitioner objected

and asserted that the government bore the burden of proving both that petitioner knowingly possessed the firearms and ammunition and that, at the time of possession, he was aware of his unlawful immigration status. Id. at 33-34; Pet. App. 4a-5a. The district court overruled petitioner's objection. Pet. App. 5a.

The jury found petitioner guilty on both counts. Verdict 1. The district court sentenced petitioner to 18 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-20a. The court identified three elements of an 18 U.S.C. 922(g) violation: the status element (whether "the defendant falls within one of the categories listed in the § 922(g) subdivisions"); the possession element (whether "the defendant possessed a firearm or ammunition"); and the jurisdiction element (whether "the possession was 'in or affecting [interstate or foreign] commerce'"). Pet. App. 8a (quoting 18 U.S.C. 922(g)) (brackets in original). The court adhered to its prior decision in Jackson v. United States, 120 F.3d 1226 (1997), which had determined that conviction for a criminal violation of Section 922(g) does not require proof of a defendant's knowledge of his own status (there, as a felon). Pet. App. 11a & n.2. The court indicated that it would recognize a mistake-of-fact defense, but observed that "such defense is not alleged here." Id. at 15a n.5.

The court of appeals reasoned that "[t]extual support, prior precedent, congressional acquiescence, and analogous common law" uniformly counseled against applying a mens rea requirement to the status element of 18 U.S.C. 922(g). Pet. App. 17a. The court noted the "longstanding uniform body of precedent holding that the government does not have to satisfy a mens rea requirement with respect to the status element of § 922," id. at 12a, and observed that, "despite ample opportunity to do so, Congress has never revisited the issue" in light of this prevailing judicial construction, id. at 13a. And it explained that, "even at common law and early American law, the government did not have the burden of proving that the defendant knew a specific fact or detail about himself." Id. at 14a.

ARGUMENT

Petitioner renews his contention (Pet. 5-15) that conviction under 18 U.S.C. 922(g)(5) requires the government to prove both that he knowingly possessed a firearm or ammunition and that he knew he was not authorized to be in the United States at the time of the possession. Like the courts below, every circuit to consider the question has determined that a conviction under Section 922(g) requires proof that the defendant knowingly possessed a firearm, but not proof that he knew his own status. In the absence of a circuit conflict, this Court has repeatedly declined to review that issue. And this case would be a poor

vehicle for considering the question in any event because petitioner acknowledged that he was aware that his visa had expired as of the time he possessed the firearms and ammunition. The petition for a writ of certiorari should be denied.

1. As petitioner acknowledges (Pet. 6), every court of appeals that has addressed the question over the past 30 years has determined that Sections 922(g) and 924(a)(2) require proof that (1) the defendant had a status listed in Section 922(g), (2) the defendant knowingly possessed a firearm, and (3) the firearm traveled in interstate commerce. See United States v. Smith, 940 F.2d 710, 713 (1st Cir. 1991); United States v. Huet, 665 F.3d 588, 596 (3d Cir.), cert. denied, 568 U.S. 941 (2012); United States v. Langley, 62 F.3d 602, 604-608 (4th Cir. 1995) (en banc), cert. denied, 516 U.S. 1083 (1996); United States v. Rose, 587 F.3d 695, 705-706 & n.9 (5th Cir. 2009) (per curiam), cert. denied, 559 U.S. 1019 (2010); United States v. Olender, 338 F.3d 629, 637 (6th Cir. 2003) (per curiam); United States v. Lane, 267 F.3d 715, 720 (7th Cir. 2001); United States v. Kind, 194 F.3d 900, 907 (8th Cir. 1999), cert. denied, 528 U.S. 1180 (2000); United States v. Miller, 105 F.3d 552, 555 (9th Cir.), cert. denied, 522 U.S. 871 (1997), abrogated on other grounds by Caron v. United States, 524 U.S. 308 (1998); United States v. Games-Perez, 667 F.3d 1136, 1142 (10th Cir. 2012), cert. denied, 571 U.S. 830 (2013); Jackson, 120

F.3d at 1229; United States v. Bryant, 523 F.3d 349, 354 (D.C. Cir. 2008).[1]

"[D]espite ample opportunity to do so, Congress has never revisited the issue." Pet. App. 13a. And this Court has repeatedly declined requests to review the question presented and similar questions, including in cases involving arguments that support the position petitioner presses. See Games-Perez, 667 F.3d at 1142; see also, e.g., Swaggerty v. United States, 138 S. Ct. 2649 (2018) (No. 17-7458); Fernandez v. United States, 138 S. Ct. 2642 (2018) (No. 17-8884); Beasley v. United States, 138 S. Ct. 1583 (2018) (No. 17-8195); Huett v. United States, 138 S. Ct. 1452 (2018) (No. 17-7946); Arthurs v. United States, 137 S. Ct. 254 (2016) (No. 16-5630); Potts v. United States, 566 U.S.

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[1] As these decisions reflect, the majority of prosecutions under Section 922(g) concern Subsection (1), prohibiting firearm possession by felons. But the courts of appeals have construed the statutes in the same way for defendants whose status bars them from firearm possession under other paragraphs of Section 922(g). See, e.g., United States v. Butler, 637 F.3d 519, 523-525 (5th Cir.) (person discharged from Armed Forces under dishonorable conditions under Section 922(g)(6)), cert. denied, 565 U.S. 1092 (2011); United States v. Hancock, 231 F.3d 557, 562-563 (9th Cir. 2000) (person convicted of misdemeanor crime of domestic violence under Section 922(g)(9)), cert. denied, 532 U.S. 989 (2001); United States v. Hutzell, 217 F.3d 966, 967-968 (8th Cir. 2000) (same), cert. denied, 532 U.S. 944 (2001); United States v. Kafka, 222 F.3d 1129, 1131-1133 (9th Cir. 2000) (person subject to restraining order under Section 922(g)(8)), cert. denied, 532 U.S. 924 (2001); United States v. Montero-Camargo, 177 F.3d 1113, 1120 (9th Cir. 1999) (unlawfully present alien under Section 922(g)(5)), opinion withdrawn, 192 F.3d 946, reinstated in part by en banc opinion, 208 F.3d 1122, 1128 n.8 (2000).

923 (2012) (No. 11-6414); Coney v. United States, 562 U.S. 949 (2010) (No. 09-9714); Brent v. United States, 558 U.S. 829 (2009) (No. 08-9319). The same course is appropriate here.

a. For 80 years, federal law has prohibited certain categories of individuals from receiving or possessing firearms. Enacted in 1938, the Federal Firearms Act, ch. 850, § 2(f), 52 Stat. 1251, made it "unlawful for any person who has been convicted of a crime of violence * * * to receive any firearm" transported in interstate commerce. In 1968, Congress prohibited firearm possession by (1) all felons; (2) individuals dishonorably discharged from the armed forces; (3) individuals adjudged mentally incompetent; (4) individuals who have renounced their citizenship; and (5) aliens unlawfully within the United States. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. VII, § 1202(a), 82 Stat. 236.

In 1986, Congress consolidated various firearm provisions of Title 18, and in the process transferred the prohibitions on firearm possession to their current statutory location in 18 U.S.C. 922(g). See Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 102(6), 100 Stat. 452. Section 922(g) makes it "unlawful for any person" in one of nine enumerated categories -- including aliens "illegally or unlawfully in the United States" -- "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any

firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. 922(g) and (g)(5)(A). A person who "knowingly violates" Section 922(g) "shall be fined * * * , imprisoned not more than 10 years, or both." 18 U.S.C. 924(a)(2).

b. Determining "the mental state required for commission of a federal crime requires 'construction of the statute and ... inference of the intent of Congress.'" Staples v. United States, 511 U.S. 600, 605 (1994) (citation omitted). Section 922(g), like its statutory predecessors, does not itself expressly require any particular mental state. Nevertheless, consistent with the understanding that a federal criminal defendant must "know the facts that make his conduct illegal," ibid.; see Morissette v. United States, 342 U.S. 246, 250 (1952), federal courts have long interpreted statutes prohibiting felons and other categories of individuals from possessing firearms to require that the defendant knowingly possessed a firearm, see United States v. Dancy, 861 F.2d 77, 81 (5th Cir. 1988) (per curiam). Federal courts have not, however, required proof that a defendant who knowingly possessed a firearm knew of his own status. See ibid. (collecting cases); see also Langley, 62 F.3d at 604 (collecting additional cases).

When Congress transferred the prohibitions on firearm possession to Section 922(g) in 1986, it provided that the

penalties set forth in Section 924(a)(2) apply to those who "knowingly" violate Section 922(g). FOPA § 104(a)(1), 100 Stat. 456. Courts of appeals have reasoned that the 1986 amendments should be read as codifying the uniform prior judicial interpretation that the government must prove only that the defendant in such a prosecution is in one of the covered categories and knowingly possessed a firearm, not that the defendant knew of his own status. See Langley, 62 F.3d at 604-606. As the court of appeals stated, Congress' "addition of a mens rea identical to that already imposed by courts does not suggest a change in meaning." Pet. App. 12a; see Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

Courts of appeals have similarly read the legislative history of the 1986 amendments as indicating that "Congress intended to incorporate former law when it expressly introduced the knowledge element." Dancy, 861 F.2d at 81; see United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988). In particular, courts of appeals have reasoned that if Congress intended to depart from the uniform prior judicial interpretation, Congress "would have made clear its intention to do so." Langley, 62 F.3d at 606.

Courts of appeals interpreting Section 922(g) have also relied on general principles of federal criminal intent. A mens rea requirement need not apply to every element in a federal

criminal statute; courts "read into the statute 'only that mens rea which is necessary to separate wrongful conduct from "otherwise innocent conduct."'" Elonis v. United States, 135 S. Ct. 2001, 2010 (2015) (citation omitted). Courts of appeals have reasoned that this "'presumption of mens rea' for an element of an offense carries far less force when there is little 'opportunity for reasonable mistake' about that element" and "[a] defendant's knowledge of his own status offers little room for 'reasonable mistake.'" Pet. App. 17a (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 68 (1994)); see, e.g., Langley, 62 F.3d at 606; United States v. Capps, 77 F.3d 350, 353 (10th Cir.), cert. denied, 518 U.S. 1027 (1996). Indeed, the courts have observed that this Court's precedents have required that "the government prove mens rea for elements of an offense that concern the characteristics of other people and things," Pet. App. 15a-16a, but that "no precedent" of this Court "requires the government to prove that the defendant knew of his own status," id. at 17a.

Petitioner's case is illustrative of that reasoning. Petitioner entered the country under an F-1 nonimmigrant student visa expressly conditioned on his pursuit of a full course of study, and he signed a Certificate of Eligibility "certifying that he agreed to comply with the terms and conditions of his admission." Pet. App. 2a-3a. Yet at the time he unlawfully possessed the firearms and ammunition in this case, petitioner had

been academically dismissed from the Florida Institute of Technology for nearly a year and had been notified that his immigration status would be terminated unless he enrolled in a different institution. Id. at 3a. Indeed, petitioner admitted to an FBI agent that he knew that his student visa -- his sole basis for lawful presence in the country -- was no longer valid at the time he possessed the firearms and ammunition. Id. at 3a-4a.

2. Not only does the uniform determination of the courts of appeals not warrant this Court's review, but this case is not a suitable vehicle for considering the mens rea required by Sections 922(g) and 924(a)(2) for two further reasons.

First, as noted, the undisputed facts demonstrate that petitioner knew of his restricted status. He does not dispute that, upon receiving his student visa, he certified that he would comply with the visa's condition requiring him to pursue a full course of study. He acknowledges (Pet. 2) that he was advised by email of the termination of his immigration status after he was academically dismissed from FIT, 11 months before he possessed two firearms and purchased ammunition. And the FBI agent who interviewed petitioner shortly thereafter testified that petitioner "admitted * * * that he was aware that his student visa was out of status" at the time he visited the shooting range. Pet. App. 3a-4a. Contrary to petitioner's assertion (Pet. 12), he

has no "viable defense" that he lacked the mens rea he contends should be required under the statute.

Second, the majority of prosecutions under Section 922(g) concern paragraph (1), which prohibits possession of firearms and ammunition by felons, but petitioner was prosecuted under paragraph (5), which prohibits possession by aliens "illegally or unlawfully in the United States." 18 U.S.C. 922(g)(5). In the district court, petitioner himself distinguished between the two provisions. See D. Ct. Doc. 53, at 33 (arguing that the presumption that an individual knows of his own felon status should not apply to aliens illegally present in the United States). Further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 17-9560

In The
Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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PETITION FOR A WRIT OF CERTIORARI

I. The government ignores the plain meaning of § 924(a)(2)'s "knowingly violates" provision.

In his petition, Mr. Rehaif explained how 18 U.S.C. § 924(a)(2) provides the penalty for anyone who "knowingly violates" 18 U.S.C. § 922(g).[1] He argued that a plain reading of the statutes shows that the "knowingly violates" provision should apply equally to the possession and status elements of a § 922(g) crime. Pet. 5-6.

To support his argument, Mr. Rehaif relied heavily on the reasoning of then-Judge, now-Justice, Gorsuch in *United States v. Games–Perez*, 667 F.3d 1136 (10th Cir. 2012), and *United States v. Games-Perez*, 695 F.3d 1104 (10th Cir. 2012) (en banc). Pet. 8-11. Then-Judge Gorsuch explained that the plain language of the statutes should require the *mens rea* of "knowingly violates" found in § 924(a)(2) to apply to both non-jurisdictional elements of a § 922(g) offense. He stated that it "defies linguistic sense" for the word "knowingly" to apply to the possession of a firearm, but not to the status of the possessor that makes the possession illegal. 667 F.3d at 1143. Then-Judge Gorsuch opined that "we might be better off applying the law Congress wrote . . . It is a perfectly clear law as it is

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[1] Section 922(g) prohibits persons in nine enumerated categories from possessing a firearm or ammunition. One of those categories is being an alien illegally or unlawfully in the United States. *See* 18 U.S.C. § 922(g)(5).

written, plain in its terms, straightforward in its application." Pet. 10 (quoting *Games–Perez*, 667 F.3d at 1145-46). Construing the statutes' plain language, then-Judge Gorsuch concluded that resort to canons of statutory construction was unnecessary because "the *law* before us that survived the gauntlet of bicameralism and presentment couldn't be plainer. By their express terms, §§ 922(g) and 924(a)(2) do not authorize the government to imprison [persons] unless and until the government can show they *knew* of their [prohibited] status at the time of the alleged offense." *Games-Perez*, 695 F.3d at 1118.

The government's response is to ignore everything then-Judge Gorsuch said in the two *Games-Perez* cases. BIO at 5-11. Instead, the government relies on circuit cases where the "knowingly" requirement was only applied to the possession element of the crime, not the status element; Congress's lack of action since passage of the Firearms Owners' Protection Act in 1986; and other petitions that this Court has declined to review. BIO at 6-8. Nowhere does the government attempt to explain how "knowingly violates" can be read to apply to the possession element of a § 922(g) crime, but not also to the status element.

The government relies on *Staples v. United States*, 511 U.S. 600, 605 (1994), for the proposition that determining the mental state required for commission of a federal offense requires construction of the statute and inference of the intent of Congress. BIO at 9. *Staples*, though, is distinguishable. The statute

at issue in *Staples* made it "unlawful for any person" to possess an unregistered machine gun. 26 U.S.C. § 5861(d). Like here, § 5861 did not contain a *mens rea* requirement, and the penalty upon conviction was set out in a different statute. *See* 26 U.S.C. § 5871. Unlike here, however, the penalty statute in *Staples* did not have an explicit *mens rea* requirement: "Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both." *Id.* In contrast, § 924(a)(2) sets out the punishment for anyone who "knowingly violates" § 922(g). There is thus no need to infer the intent of Congress regarding *mens rea* in a § 922(g) case because Congress's intent is clearly set out in the statute.

For the same reason, the government's reliance on legislative history, BIO at 10-11, is misplaced. As explained in Mr. Rehaif's petition, the starting point for any statutory interpretation is the language of the statute, and when that language is plain, the sole function of the court is to enforce the statute according to its terms. Pet. 6-7 (citing cases).

The government's reliance on *Elonis v. United States*, 135 S. Ct. 2001 (2015), is similarly misplaced. BIO at 11. The statute at issue in *Elonis*, 18 U.S.C. § 875(c), "does not specify any required mental state." 135 S. Ct. at 2009. It was in that context that the Court wrote: "When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute only that *mens rea*

which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.* at 2010 (citation and internal quotation marks omitted); *see* BIO at 11. Here, it is neither necessary nor proper to "read into the statute" a *mens rea* when the statute already explicitly contains a *mens rea* ("knowingly violates").

II. This case is an excellent vehicle for considering this important issue.

The government asserts that this case is not a good vehicle for considering the *mens rea* required by §§ 922(g) and 924(a)(2) because "the undisputed facts demonstrate that petitioner knew of his restricted status." BIO at 12. But, as acknowledged below, Mr. Rehaif's planned defense was that he did not know he was in the United States illegally or unlawfully, and that defense was eviscerated by the district court's jury instruction that the government need not prove that he knew he was in the United States illegally or unlawfully. Pet. App. 6a.

The government relies on emails Florida Institute of Technology (FIT) sent to Mr. Rehaif advising him of the termination of his immigration status after he was academically dismissed, BIO at 12, but there was no attempt by FIT to confirm that Mr. Rehaif had received the emails. Doc. 108 at 233. Nor was there any attempt to talk with Mr. Rehaif on the telephone, or to set up a meeting with him. *Id.* at 233-34. Mr. Rehaif did not respond to either email. *Id.* at 218-19. It was a potential defense, then, to argue that Mr. Rehaif never received the FIT email and thus did not know his immigration status had been terminated. But that defense

was not viable in light of the contested jury instruction given below: "The United States is not required to prove that the Defendant knew that he was illegally or unlawfully in the United States." Doc. 69 at 16.

The government also relies on the testimony of an FBI agent that Mr. Rehaif admitted being aware that his student visa was out of status. BIO at 12-13. The interview, though, was not recorded and the other two law enforcement agents present for the interview did not testify. Doc. 109 at 99-101. That testimony could also have been vigorously challenged, then, if the jury had been correctly instructed that the government had to prove Mr. Rehaif was aware of his status as an alien illegally in the United States.

Finally, the government points out that this case concerns § 922(g)(5), while the majority of § 922(g) prosecutions concern § 922(g)(1). That is a meaningless distinction. The question of law this Court is being asked to decide is whether, pursuant to the "knowingly violates" provision of § 924(a)(2), the government must prove in <u>every</u> § 922(g) case that the defendant knew of his status as a prohibited person.

The issue presented here is important as it affects thousands of prosecutions every year. The issue is vexing because, thus far, no one has explained how then-Judge Gorsuch erred by analyzing the plain language of § 924(a)(2) to require a defendant know of his status as a prohibited person in a § 922(g) prosecution. The

analysis by other courts misses the mark because those courts do not begin with a careful consideration of the plain language of the statute. That plain language ("knowingly violates") is clear and unambiguous, so all that is left for courts to do is enforce that requirement. Finally, this case is an ideal vehicle as the issue was fully preserved below and addressed on its merits by the court of appeals.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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IN THE

Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether the "knowingly violates" provision of 18 U.S.C. § 924(a)(2) applies to the first listed element of an 18 U.S.C. § 922(g) crime – a person's prohibited status.

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Pub. L. No. 90-351, 82 Stat. 225 (1968) 20
Pub. L. No. 90-618, 82 Stat. 1223-24 (1968) 20

OTHER AUTHORITIES

4 William Blackstone, *Commentaries* 27
132 Cong. Rec. 9590 (1986) (statement of Sen. Hatch) 10, 21
Model Penal Code § 2.02(4) (Am. Law Inst. 1985) 16
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BRIEF OF PETITIONER

The Petitioner, Hamid Mohamed Ahmed Ali Rehaif, respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The initial opinion of the United States Court of Appeals for the Eleventh Circuit was published at *United States v. Rehaif*, 868 F.3d 907 (11th Cir. 2017). Pet. App. 21a-37a. After a petition for rehearing *en banc* was filed, the Eleventh Circuit *sua sponte* vacated its initial published opinion and substituted a revised opinion, which is published at *United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018). Pet. App. 1a-20a.

JURISDICTION

The Eleventh Circuit issued its revised opinion on March 26, 2018. Petitioner filed a timely petition for a writ of certiorari on June 21, 2018, which this Court granted on January 11, 2019. __ S. Ct. __, 2019 WL 166874 (Jan. 11, 2019). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Section 922(g) of Title 18, U.S. Code, provides:

> It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 924(a)(2) of Title 18, U.S. Code, provides:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

Section 922(g) prohibits persons of various statuses from possessing a firearm or ammunition. 18 U.S.C. § 922(g). A person who "knowingly violates" § 922(g) is subject to up to 10 years in prison. 18 U.S.C. § 924(a)(2). The issue presented is whether the "knowingly violates" requirement applies to both substantive elements, status and possession, or whether it applies to only the second substantive element, possession. The plain language of the statutes establishes that the government must prove an individual has knowledge of both his status and his possession of a firearm.

1. Mr. Rehaif is a citizen of the United Arab Emirates (UAE). Doc. 108 at 175; Doc. 73-5 (Exhibit 3A). In July 2013, Mr. Rehaif applied for and was granted admission to Florida Institute of Technology (FIT) as a student. Doc. 108 at 186-89. The admissions office at FIT generated an I-20 Form, which is a "Certificate of Eligibility for Nonimmigrant (F-1) Student Status – For Academic and Language Students." Doc. 108 at 187, 207-08; Doc. 73-3 (Exhibit 2A). FIT sent the I-20 Form to Mr. Rehaif, who then obtained an F-1 student visa. Doc. 108 at 188, 210-11; Doc. 73-4 (Exhibit 2B); Doc. 73-6 (Exhibit 3B).

The student visa was issued on July 25, 2013, and provided an expiration date of July 22, 2017. Doc. 73-6. The stamps on the visa show the two times Mr. Rehaif entered the United States. Each have "F1" and "D/S" scrawled on them. *Id.* There was no evidence that Mr. Rehaif was informed of or understood what these scribbled marks meant. The trial testimony revealed that "F1" means that Mr. Rehaif was admitted into the United States as an F-1 student. Doc. 108 at 215. The "D/S" means "duration of status," which is the length of time that individuals in F-1 status are admitted into the United States. *Id.* at 215, 228.

Mr. Rehaif attended school at FIT during the Fall 2013, Spring 2014, and Fall 2014 semesters. Doc. 73-9 (Exhibit 5); Doc. 108 at 219-21. On January 21, 2015, FIT sent emails to Mr. Rehaif at the two email addresses it had on file for him. Docs. 73-7, 73-8 (Exhibits 4A and 4B); Doc. 108 at 194. Other than the addresses, the emails were identical, each stating Mr. Rehaif had been "academically dismissed" and his "immigration status will be terminated on February 5, 2015 unless you transfer out before that date, or you notify our office that you have already left the United

States." Docs. 73-7, 73-8; Doc. 108 at 218-19. FIT did not confirm that Mr. Rehaif had received the emails. Doc. 108 at 233. Nor did FIT attempt to speak with Mr. Rehaif on the telephone or otherwise to discuss the implications of his school termination. *Id.* at 233-34. Mr. Rehaif did not respond to either email. *Id.* at 218-19.

After receiving FIT's notification that Mr. Rehaif was no longer enrolled there, the Student & Exchange Visitor Immigration System (SEVIS) terminated Mr. Rehaif's visa status on February 23, 2015. Doc. 73-10 (Exhibit 6); Doc. 108 at 222-24. The SEVIS information was then reported to the Student & Exchange Visitor Program (SEVP). Doc. 108 at 237, 241.[1] There was no evidence introduced at trial that anyone from the SEVP, or any other governmental agency, contacted Mr. Rehaif about the status change that was made in the SEVIS data bank. Doc. 108 at 243-44.

2. On December 2, 2015, Mr. Rehaif went to a shooting range in Melbourne, Florida. Pet. App. 3a; *see* Doc. 109 at 38-43, 45; Doc. 73-14 (Exhibit 10A). He purchased a box of ammunition and rented a firearm for one hour of shooting. Doc. 109 at 50-52; Doc. 73-17 (Exhibit 11). Part way through the hour, he exchanged one firearm for another. Doc. 109 at 63-64.

On December 8, 2015, law enforcement went to the hotel where Mr. Rehaif was staying after receiving a call saying Mr. Rehaif had been staying there for almost two months, paying for the room anew each day, and he had given ammunition to two hotel employees. Doc. 109 at 97. FBI Agent Thomas Slone

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[1] SEVIS and SEVP are both part of the U.S. Department of Homeland Security (DHS). Doc. 100 at 15-16; Doc. 108 at 223-24, 236-37.

questioned Mr. Rehaif. According to Agent Slone, Mr. Rehaif acknowledged that, at the shooting range, he shot two firearms and purchased the box of ammunition found in his hotel room. *Id.* at 100. Agent Slone also testified that, during his interview, Mr. Rehaif said he had been academically dismissed from FIT after the Fall 2014 semester and that he knew he was out of status for his immigration because he was not in school. *Id.* at 99, 101. The interview was not recorded. *Id.* at 101. According to Agent Slone, it was "standard procedure for us not to record the interview unless somebody was in custody." *Id.* Also present at the interview were "one other special agent and one Melbourne police officer." *Id.* at 104; *see* Doc. 44 at 3-4. Agent Slone, though, was the only person who testified about what Mr. Rehaif allegedly said in the interview.

3. The grand jury subsequently charged that Mr. Rehaif, an alien illegally and unlawfully in the United States, knowingly possessed, in and affecting interstate and foreign commerce, a firearm on December 2, 2015 (Count One), and ammunition on December 8, 2015 (Count Two), both in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). Doc. 13.

At trial, the government requested that the district court instruct the jury: "The United States is not required to prove that the defendant knew that he was illegally or unlawfully in the United States." Doc. 53 at 33. Mr. Rehaif opposed the request, arguing that the United States had to prove both that he had knowingly possessed a firearm and that he knew of his prohibited status – that he was illegally or unlawfully in the United States when he had possessed the firearm. *Id.* at 33-34. Mr. Rehaif asserted that "knowledge is a defense in the case." Doc. 100 at 19. The government responded: "[W]e don't think we have to show that he

knew he was out of status," and "[H]e doesn't have to know that he's an illegal alien." *Id.* at 28, 46.

The district court resolved the dispute in favor of the government, instructing the jury on the elements of the offense as follows:

> For you to find the Defendant guilty, the government must prove each of the following beyond a reasonable doubt:
>
> • the Defendant knowingly possessed a firearm (Count One) and/or ammunition (Count Two) in or affecting interstate or foreign commerce; and
>
> • before possessing the firearm and/or ammunition, the Defendant was an alien illegally or unlawfully in the United States.

Doc. 69 at 11; Doc. 109 at 168. The court further instructed:

> The United States is not required to prove that the Defendant knew that he was illegally or unlawfully in the United States.

Doc. 69 at 16; Doc. 109 at 170.

Also during trial, the defense sought to admit a copy of Mr. Rehaif's Florida driver license record. Doc. 109 at 119-29; *see* Doc. 74-1. The defense theory was that Mr. Rehaif's record showed his license was suspended in August 2015, but "no warrant [was] issued for his arrest for immigration purposes or otherwise." Doc. 109 at 128. This, defense counsel argued, would rebut Agent Slone's testimony that Mr. Rehaif admitted to being out of status. *Id.* The district court sustained the government's objection to the admission of the driver's license record, finding it would be too confusing and that it did not rebut any testimony. *Id.* at 129. But the court then added: "If it were a specific intent crime

requiring him to know that he is, his immigration status, then the ruling would be otherwise." *Id.* at 130.

The jury found Mr. Rehaif guilty on both charges. Doc. 71. He was sentenced to 18 months in prison on each count, to be served concurrently. Doc. 85. Upon his release from prison, Mr. Rehaif was deported to the UAE.

4. On appeal, Mr. Rehaif renewed his argument that the phrase "knowingly violates" in § 924(a)(2) applies to § 922(g) and thus requires the government to prove that he knew he was in the United States illegally or unlawfully when he possessed the firearm. Pet. App. 6a. The district court's contrary jury instruction thus misstated the law and eviscerated Mr. Rehaif's planned defense (that the government could not prove he knew he was in the United States illegally or unlawfully). *Id.*

5. In its revised opinion, the Eleventh Circuit rejected Mr. Rehaif's argument that the text of § 922(g) and § 924(a)(2) constituted "a perfectly clear law as it is written, plain in its terms, straightforward in its application." Pet. App. 10a (quoting *United States v. Games-Perez*, 667 F.3d 1136, 1145 (10th Cir. 2012) (Gorsuch, J., concurring in judgment)). The court also found that it was bound by precedent to conclude that "the government need not prove that the defendant knew of his prohibited status." Pet. App. 11a-12a (citing *United States v. Jackson*, 120 F.3d 1226 (11th Cir. 1997)). The court asserted legislative history buttressed its conclusions. Pet. App. 12a-14a. The court also explained why it thought this case constituted an exception to the general rule that the government must prove *mens rea* for each substantive element of the crime: "the government did not have the burden of proving that the defendant knew a specific fact or detail about himself." Pet. App. 14a-17a.

SUMMARY OF ARGUMENT

The starting point when construing a statute is its language. When, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms. Section 924(a)(2)'s "knowingly violates" requirement unambiguously applies to both the status and possession elements. The structure of the provisions also dictates as much: Section 922(g) first sets out the status element and *then* the possession element of the crime. The "knowingly violates" requirement for a § 922(g) violation does not somehow skip over the status element and apply only to the possession element.

This Court's precedent applying a *mens rea* requirement in criminal statutes confirms Mr. Rehaif's position. This Court presumes that a *mens rea* requirement attaches to each of the statutory elements that criminalize otherwise innocent conduct. And ordinarily, as is the case here, introducing the elements of a crime with the word "knowingly" means that *mens rea* requirement applies to all the ensuing substantive elements of the crime. *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009). Indeed, the Court has presumed that scienter requirements attach to each element of a crime even when the statute contains no *mens rea*. This presumption is deeply rooted in the established principle that severe criminal penalties are warranted only when a defendant commits an evil act with an "evil–meaning mind." *Morissette v. United States*, 342 U.S. 246, 251 (1952). This principle fully applies here.

Mr. Rehaif's reading of the statutes also accords with their legislative history and Congress's purpose. Congress's addition of the word "knowingly" in § 924(a)(2) reflects its intention to impose a *mens rea* requirement on all substantive elements of a § 922(g)

offense. Indeed, Congress added the "knowingly violates" requirement to address a concern that individuals were suffering "severe penalties for unintentional missteps." *See, e.g.*, 132 Cong. Rec. 9590 (1986) (statement of Sen. Hatch). This concern supports Mr. Rehaif's view that the requirement that a defendant act "knowingly" must apply to the sole element of the crime that makes the defendant's conduct criminal – his status.

Additionally, the canon of constitutional avoidance counsels in favor of Mr. Rehaif's interpretation. If the government did not have to prove a defendant had knowledge of the only element of the crime that makes firearm possession illegal, that omission would raise serious Due Process concerns. Indeed, this Court's precedent stretching back to *Morissette* strongly suggests that in such circumstances, the Due Process Clause requires a finding of an "evil mind" before severe criminal penalties are imposed.

The rule of lenity also favors Mr. Rehaif's position. To the extent that criminal statutes are ambiguous after the application of all tools of statutory interpretation, the ambit of the statutes should be resolved in favor of lenity. Critically, where, as here, dispensing with a *mens rea* requirement would subject a broad range of constitutionally protected conduct to criminal penalties, it is particularly appropriate to apply the rule of lenity to require that a defendant act knowingly. Doing so serves one of the primary purposes of the rule of lenity – ensuring that defendants have notice that their putative conduct is unlawful. *Liparota v. United States*, 471 U.S. 419, 427 (1985).

The lower court's reasoning is not persuasive. That this Court has not applied a *mens rea* requirement to jurisdictional elements does nothing to undermine

that the *mens rea* requirement applies to both substantive elements of the offense – status and possession. Further, the court of appeals' assertion that this Court's cases do not apply where one element of a crime is a defendant's own status is both unsupported by the cases and untethered to the statutes. When the question of whether a defendant has a particular status is complex – as here, with the question of immigration status, or whether a certain crime is a felony – there is no basis for distinguishing that status from any other element of a crime. Finally, the lower court's speculation that applying the "knowingly violates" requirement to the status element is inconsistent with Congress's purpose does not overcome the clear text and is incorrect.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTES AND THIS COURT'S PRESUMPTIONS REGARDING CRIMINAL *MENS REA* CONCLUSIVELY DEMONSTRATE THAT § 924(a)(2)'s "KNOWINGLY VIOLATES" PROVISION APPLIES TO BOTH THE STATUS AND POSSESSION ELEMENTS OF A § 922(g) VIOLATION.

Section 924(a)(2) of Title 18, U.S. Code, provides that "[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." Section 922(g), in turn, prohibits persons of certain statuses from possessing a firearm or ammunition.

The plain text of the statutes demonstrates that a person "knowingly violates" § 922(g) when he knows (1) his status and (2) he possesses a firearm. Indeed, a person does not "knowingly violate[]" § 922(g) when he does not know the one fact that makes his

possession of a firearm unlawful – i.e., his status. The structure of § 922(g), which lists the status element first and then the possession element, reinforces that § 924(a)(2)'s "knowingly violates" provision applies to both substantive elements of § 922(g). Moreover, Mr. Rehaif's reading is consistent with this Court's longstanding tradition of applying *mens rea* to each substantive element of an offense.

A. The Plain Text and Structure of the Provisions Make Clear That "Knowingly Violates" Applies to Both the Status and Possession Elements of § 922(g).

By its terms, the "knowingly violates" provision in § 924(a)(2) is not limited to the knowing possession of a firearm. A plain reading of the statutes shows that the "knowingly violates" provision applies equally to the status and possession elements of a § 922(g) crime.

The starting point when construing a statute is the language of the statute. *Staples v. United States*, 511 U.S. 600, 605 (1994). "As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citations and internal quotation marks omitted). The Court has instructed "time and again" that courts presume Congress "says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citing cases). Courts must "give effect to the text Congress enacted." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008); *see Culbertson v. Berryhill*, 139 S. Ct. 517, 521 (2019) ("We begin with the language of the statute itself, and that is also where the inquiry should end, for the

statute's language is plain.") (internal quotation marks, brackets, and citation omitted).

The statutory text here is unambiguous. Thus, the "knowingly violates" language of § 924(a)(2) applies to both substantive elements of a § 922(g) violation: (1) the status that makes a person's possession illegal (here, that Mr. Rehaif was "illegally or unlawfully in the United States") and (2) the possession of a firearm. A person does not *knowingly violate* § 922(g) without knowing the one fact that makes his possession of the firearm illegal – i.e., his status. Congress could have, of course, demonstrated a different intent through other structural cues,[2] but nothing in the language of §§ 922(g) and 924(a)(2) signals to the reader that the "knowingly violates" requirement bypasses the status element only to apply to the possession element.

This plain grammatical reading is reinforced by the structure of the statutes. Section 922(g) *first* lists the statuses of persons covered, and only *then* provides that persons in those statuses may not possess firearms and ammunition. With this sequencing, the most natural reading of the statutes is that the "knowingly violates" requirement applies to both status and possession elements. To construe the provisions otherwise, one must "read[] the word 'knowingly' as leapfrogging over the very first § 922(g) element and touching down only at the second" – an interpretation that "defies linguistic sense – and not a little grammatical gravity." *United States v. Games-Perez*, 667 F.3d 1136, 1143 (10th Cir. 2012) (Gorsuch,

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[2] *See, e.g.*, 18 U.S.C. § 2241(c)-(d) (proscribing engaging in a sexual act with a person under the age of 12, and providing: "In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years").

J., concurring in judgment). "[T]he *law* before us that survived the gauntlet of bicameralism and presentment couldn't be plainer. By their express terms, §§ 922(g) and 924(a)(2) do not authorize the government to imprison [persons] unless and until the government can show they *knew* of their felon status at the time of the alleged offense." *United States v. Games-Perez*, 695 F.3d 1104, 1118 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc).[3]

B. This Reading of the Plain Text is Consistent with this Court's Treatment of *Mens Rea* Requirements in Criminal Statutes.

The most natural reading of the provisions accords with this Court's precedent applying the statutory *mens rea* requirement to all substantive elements of a criminal violation. In *Flores-Figueroa*, the Court interpreted a statute that imposed criminal penalties on certain offenders who "knowingly transfer[], possess[], or use[], without lawful authority, a means of identification of another person." 556 U.S. at 648. The question was whether that statute required the government to prove "that the defendant *knew* that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'" *Id.* at 647. There, as here, all parties agreed that that the defendant had to know that he or she was engaged in the activity in question. But the government argued that the word "knowingly" "does not modify the statute's last phrase ('a means of

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[3] The third element of a § 922(g) violation is the interstate or foreign commerce nexus. That element is jurisdictional in nature, not substantive, and intent is not generally required for such an element. *See* Part III.A, *infra*.

identification of another person') or, at the least, it does not modify the last three words of that phrase ('of another person')." *Id.* at 648.

This Court rejected the government's argument, using reasoning applicable here. The Court found "strong textual reasons for rejecting the Government's position" because, "[a]s a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime." *Id.* at 650. The Court further explained that, in interpreting federal criminal law, "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Id.* at 652 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring)); *see also Liparota*, 471 U.S. at 420 n.1, 423 (holding that the word "knowingly" applies to the phrase "in any manner not authorized by [law]," in a federal food stamp statute providing "[w]hoever knowingly uses, transfers, acquires, alters or possesses coupons or authorization cards in any manner not authorized by [law]").

Likewise, in *X-Citement Video*, the Court interpreted a statute that imposed criminal penalties on "[a]ny person who – (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if – (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 513 U.S. at 68. The question there was whether "knowingly" modified "the use of a minor." *Id.* This Court recognized that the phrase was not the direct object of the verbs that "knowingly" modified and that the phrase was in a different subsection. Indeed, the Court highlighted that many sex crimes involving

minors do not require the offender to know that the victim is a minor. *Id.* at 68, 70, 72 & n.2. Nonetheless, this Court concluded that the intent element ("knowingly") applied not only to the transportation or shipment of visual depictions of sexually explicit activity, but also to "the use of a minor" in such depictions. *Id.* at 78.

In so holding, the Court read its prior cases to "instruct[] that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 72; *see also Flores-Figueroa*, 556 U.S. at 660 (Alito, J., concurring) ("In interpreting a criminal statute such as the one before us, I think it is fair to begin with a general presumption that the specified *mens rea* applies to all the elements of an offense, but it must be recognized that there are instances in which context may rebut that presumption.").[4]

In this case, "the crucial element separating legal innocence from wrongful conduct," *X-Citement Video*, 513 U.S. at 73, is Mr. Rehaif's status as an alien

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[4] This Court's approach in *Flores-Figueroa* is consistent with that of the Model Penal Code § 2.02(4) (Am. Law Inst. 1985), which states:

> Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

The explanatory note indicates that this provision "is addressed to a pervasive ambiguity in definitions of offenses that include a culpability requirement, namely, that it is often difficult to determine how many of the elements of the offense the requirement is meant to modify."

illegally in the United States. This Court's jurisprudence therefore directs that the statutory *mens rea* of knowledge must apply to that element. It is "hardly crazy to think that in a § 922(g)(1) prosecution Congress might require the government to prove that the defendant had knowledge of the *only fact* (his felony status) separating criminal behavior from not just permissible, but constitutionally protected, conduct." *Games-Perez*, 667 F.3d at 1145 (Gorsuch, J., concurring).

Moreover, this established presumption – that a *mens rea* requirement attaches to each statutory element that results in the criminalization of innocent conduct – applies even in criminal statutes that do not specify any *mens rea*. In *Staples*, for example, the Court considered a statute that criminalized possession of an unregistered "firearm" and defined "firearm" to include automatic and exclude semi-automatic guns. 511 U.S. 600. The defendant argued that he believed the weapon was semi-automatic and that his lack of knowledge of the weapon's status precluded his conviction. *Id.* at 602. Despite the absence of any *mens rea* requirement in the statutory text, this Court explained that "[s]ilence does not suggest that Congress dispensed with *mens rea* for the element . . . at issue here." *Id.* at 619. The Court then held that "the Government should have been required to prove that petitioner knew of the features of his [gun] that brought it within the scope of the Act." *Id.* at 619-20. In so holding, the Court relied on "the background rule of the common law favoring *mens rea* and the substantial body of precedent . . . developed construing statutes that do not specify a mental element." *Id.* at 619 n.17.

Similarly, in *Elonis v. United States*, this Court stated that "[t]he fact that the statute does not specify

any required mental state . . . does not mean that none exists." 135 S. Ct. 2001, 2009 (2015). In that context, the Court again emphasized that the "presumption in favor of a scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct." *Id.* (quoting *X–Citement Video*, 513 U.S. at 72); *see also Morissette*, 342 U.S. at 250 ("[M]ere omission from a criminal enactment of any mention of criminal intent [should not be read] as dispensing with it.") *Id.* at 252 ("[W]rongdoing must be conscious to be criminal."). It makes sense for courts to read a *mens rea* requirement *into* a crime's statutory elements, but it makes no sense when Congress expressly imposes a "knowingly violates" element in § 924(a)(2) for § 922(g) offenses to read that *mens rea* element *out* of the statute. *See Games-Perez*, 667 F.3d at 1143-44 (Gorsuch, J., concurring).

This Court's precedent discussed above has a venerable pedigree. As Justice Jackson explained:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette, 342 U.S. at 250. The doctrine is found in "Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'" *Id.* at 251 (quoting 4 William Blackstone, *Commentaries* *21). Further, the concept that crimes "generally [are] constituted only from concurrence of an evil-meaning mind with an evil-doing hand[] was congenial to an intense individualism and took deep and early root in American soil." *Id.* at 251-52. *Elonis*, accordingly, is yet another manifestation of an established principle

that governs this Court's interpretation of federal criminal laws.

In sum, this Court presumes a *mens rea* requirement attaches to all statutory elements that criminalize otherwise innocent conduct. *X-Citement Video*, 513 U.S. at 72. Further, when the scienter required is "knowingly," that scienter applies to all elements of the crime, as this Court unanimously held in *Flores-Figueroa*, 556 U.S. at 650, 652. The plain text of the relevant provisions here, as well as this Court's treatment of the *mens rea* requirements of criminal statutes, thus mandate that before a defendant may be convicted of a § 922(g) offense, he must *knowingly violate* § 922(g) as to both the status and possession elements of the crime.

II. ADDITIONAL TOOLS OF STATUTORY CONSTRUCTION SUPPORT MR. REHAIF'S INTERPRETATION.

The plain language of the statutes alone should decide this case. Mr. Rehaif's reading also draws support from other tools of statutory construction, including a review of the congressional purpose, the constitutional avoidance canon, and the rule of lenity.

A. Mr. Rehaif's Reading of "Knowingly Violates" is Consistent With the History and Purpose of the Firearm Owners' Protection Act.

The historical and legal backdrop against which § 924(a)(2) was enacted supports reading "knowingly violates" as applying to both the status and possession elements of § 922(g). *See Wirtz v. Local 153, Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968) ("[P]roper construction [of a statute's text] frequently requires consideration of wording against the background of its

legislative history and in the light of the general objectives Congress sought to achieve.").

Congress enacted the relevant text of § 924(a)(2) as part of the Firearms Owners' Protection Act (FOPA) in 1986. *See* Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986). As its title suggests, Congress passed FOPA to ease any undue or unnecessary federal restrictions or burdens on firearm possession. *See id.*; *see also United States v. Turkette*, 452 U.S. 576, 588-90 (1981) (relying on RICO's statement of purpose, 18 U.S.C. § 1961, to interpret the term "enterprise"); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (providing that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute") (internal quotation marks omitted).

Before FOPA's enactment, federal regulation of firearms was primarily governed by the Gun Control Act of 1968. *See* Pub. L. No. 90-351, 82 Stat. 225 (1968). Like FOPA, the Gun Control Act barred certain individuals from possessing firearms. *Id.* But unlike FOPA, the Gun Control Act contained no *mens rea* requirement. The Act simply provided that, "[w]hoever violates any provision of this chapter . . . shall be fined not more than $5,000, or imprisoned not more than five years, or both." Pub. L. No. 90-618, § 102, 82 Stat. 1223-24 (1968).

Despite the lack of an express *mens rea* requirement, courts did not interpret the Act to impose strict liability. *See United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 560 (1971). Courts, however, consistently interpreted portions of the Act as requiring the minimum *mens rea* requirement: knowledge of the possession of a firearm. They did not however, require the government to prove that the

defendant knew that he came within a category of persons prohibited from possessing a firearm.[5]

Significantly for this case, throughout FOPA's enactment process, Congress expressed its concern about the Gun Control Act's minimal *mens rea* requirements. For instance, a 1982 report by the Senate Subcommittee on the Constitution, which became the genesis for FOPA, expressly criticized enforcement efforts under the Gun Control Act because those efforts were devoted largely to the "apprehension, upon technical *malum prohibitum* charges, of individuals who lack all criminal intent and knowledge." *See* The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution, Senate Judiciary Committee, 97th Cong., 2d Sess. (1982).Thus, when enacting FOPA, one congressional purpose was to strengthen the *mens rea* requirements for most of the Gun Control Act's provisions. *See* 132 Cong. Rec. 9590 (1986) (statement of Sen. Hatch) (expressing Congress's concern that the lack of such a requirement had resulted in "severe penalties for unintentional missteps"). Congress directly addressed the concerns raised in the Constitution Subcommittee's report by amending § 924(a)(2) to add a knowledge *mens rea* requirement and impose penalties on only an individual who "knowingly violates" § 922(g). *See* Pub. L. No. 99-308, § 101, 100 Stat. 449, 450.

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[5] *See also United States v. Ware*, 758 F.2d 557 (11th Cir. 1985) (defendant's belief that he could lawfully receive firearms would be irrelevant and inadmissible); *United States v. Pruner*, 606 F.2d 871 (9th Cir. 1979) (trial court committed no error in not permitting the jury to consider whether defendant knew it was illegal for him to receive a firearm); *United States v. Ruisi*, 460 F.2d 153 (2d Cir. 1972) (government need not establish that defendant knew it was illegal for him to receive firearms).

Against this historical and legal backdrop, Congress's addition of "knowingly" to § 924(a)(2) is significant. It reveals an intent to *extend*, rather than retract or leave in place, existing *mens rea* requirements under the Gun Control Act. *See Pa. Dep't Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990) (finding that the statutory language evidenced an intent to depart from past practice). As one judge has explained:

> [I]t is clear from the legislative history that the primary motivation for adding *any* express *mens rea* requirement to the FOPA provisions at issue here was to increase the safeguards against convictions for inadvertent, or careless conduct. That is to say, the general legislative intent indisputably was to move in the direction of extending rather than retracting or leaving in place existing *mens rea* requirements as judicially interpreted.

United States v. Langley, 62 F.3d 602, 618 (4th Cir. 1995) (Phillips, J., concurring).

Congress is presumed to have been aware of existing judicial interpretation of the Gun Control Act, requiring knowledge of possessing a firearm but not requiring knowledge of one's prohibited status. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 698-99 (1979). Thus, the most logical conclusion to draw from Congress's addition of the knowledge requirement to § 924(a)(2), is that Congress meant to extend the existing *mens rea* requirements of § 922(g). And the only substantive element for which it would have been necessary to add a knowledge *mens rea* requirement is § 922(g)'s status element. Had Congress intended simply to codify existing judicial interpretation of the Gun Control Act that did not require knowledge of one's status as a prohibited person, it would not have

altered § 924's text to *add* the knowledge requirement. *See id.*

The contrary position stated by the court in *Langley* – that the chronology of FOPA's enactment demonstrates that Congress did not intend to extend the "knowingly violates" requirement to a defendant's prohibited status – is deeply flawed.[6] The majority in *Langley* concluded that "it is not clear from the legislative history of FOPA whether Congress intended to extend the term 'knowingly' to one or all of the substantive elements of each offense in § 922." 62 F.3d at 605. The *Langley* court therefore simply relied on its pre-FOPA interpretation and its belief that Congress did not change that interpretation. But Congress did change that interpretation – it added a *mens rea* requirement that is best read to apply to all substantive elements of § 922(g). "Whatever weight courts may give to judicial interpretations of predecessor statutes when the current statute is *ambiguous*, those prior interpretations of now defunct statutes carry no weight when the language of the current statute is *clear*." *Games-Perez*, 695 F.3d at 1118 (Gorsuch, J., dissenting from denial of reh'g en banc).

Moreover, at the time of FOPA's enactment, Congress would equally be presumed to be aware of this Court's "powerful primary canon of statutory construction" – "that, unless statutory language or legislative history evinces a contrary intent, a nonspecific *mens rea* requirement was intended by Congress to run to 'each of the statutory elements which criminalize otherwise innocent behavior.'" *Langley*, 62 F.3d at 614 (Phillips, J., concurring)

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[6] The Eleventh Circuit relied upon *Langley*'s analysis. *See* Pet. App. 10a-14a.

(quoting *X-Citement Video*, 513 U.S. at 72); *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978); *Dennis v. United States*, 341 U.S. 494, 500 (1951). Put differently, "the Supreme Court's application of the common law presumption of an intent to give scienter requirements their broadest possible reach (i.e., to all elements, including criminalizing 'facts and circumstances') must be accorded primacy as interpretive guide." *See Langley*, 62 F.3d at 618 (Phillips, J., concurring).

Finally, Congress knows how to dispense with a knowledge requirement when it chooses to do so. For instance, in a statute which makes it a crime to "knowingly engage[] in a sexual act with another person who – (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging," Congress expressly provided that, "the Government need not prove that the defendant knew – (1) the age of the other person engaging in the sexual act; or (2) that the requisite age difference existed between the persons so engaging." 18 U.S.C. §§ 2243(a)&(d); *see also* 18 U.S.C. § 1751(j) (providing that, "[i]n a prosecution for an offense under this section the Government need not prove that the defendant knew that the victim of the offense was an official protected by this section"); *supra* at 13 n.2 (quoting 18 U.S.C. § 2241).

When drafting FOPA, had Congress intended to exempt § 922(g)'s status element from the "knowingly violates" requirement it obviously could have done so, just as it had done in these other contexts. *See Cent. Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994). Congress presumably also could have, for example, inserted "knowingly" before the possession element of § 922(g).

Congress did neither of those things. Instead, it added "knowingly" to § 924(a)(2). That text, considered in light of the historical background in which it was enacted, further demonstrates Congress's intent to apply the "knowingly violates" requirement to all the substantive elements of § 922(g), including the single element that makes possession of a firearm illegal—one's status as a prohibited person.

B. Requiring the Government to Prove that a Defendant Knew His or Her Status at the Time of the Firearm Possession Avoids Due Process Concerns.

As demonstrated above, the text of the statutes is plain and consistent with the legislative history. An alternative reading should be rejected under the constitutional-avoidance canon. Under that canon, "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). Interpreting §§ 924(a)(2) and 922(g) to impose significant criminal penalties for gun possession on individuals who, *unbeknownst to themselves*, fall into specific categories would create significant Due Process issues. *See, e.g., United States v. Renner*, 496 F.2d 922, 926 (6th Cir. 1974) ("[T]o convict a person of an offense where being under indictment is an element, it must be shown that the accused had knowledge of the indictment; without such a showing a serious question of due process would be involved.").

While the provisions criminalize gun possession for several classes of persons, "gun possession is often lawful and sometimes even protected as a matter of constitutional right." *Games-Perez*, 695 F.3d at 1119 (Gorsuch, J., dissenting from denial of rehearing en

banc); *see also Staples*, 511 U.S. at 610 ("[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country."). Thus, "[t]he *only* statutory element separating innocent (even constitutionally protected) gun possession from criminal conduct in §§ 922(g) and 924(a) is" the defendant's status, here as an alien unlawfully in the country. *Games-Perez*, 695 F.3d at 1119 (Gorsuch, J., dissenting from denial of reh'g en banc). Imposing criminal liability on otherwise innocent conduct violates Due Process, particularly where, as here, the criminal penalties are severe. Section 924(a)(2) authorizes punishment of up to 10 years in prison.[7] It is fundamentally unfair to impose criminal punishment on a person engaged in otherwise innocent conduct without requiring proof of knowledge of what converts that innocent conduct into a serious crime.

As is evident from the decisions described *supra* at Part I.B, this Court has generally refused to "dispens[e] with *mens rea* [when doing so] would require the defendant to have knowledge only of traditionally lawful conduct." *Staples*, 511 U.S. at 618; *see also id.* at 610 ("[T]he particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct'") (quoting *Liparota*, 471 U.S. at 426); *X-Citement Video*, 513 U.S. at 72 ("[T]he presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.").

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[7] *See Staples*, 511 U.S. at 616-17 (describing potential punishment of up to 10 years' imprisonment as "severe").

In that context – where a specific statutory element converts innocent or protected conduct into criminal conduct – there is a strong argument that the Court's decisions to extend the *mens rea* requirement to that element have been constitutionally based. In *X-Citement Video*, for example, this Court considered whether a criminal statute forbidding persons to "knowingly" engage in certain activities involving the visual depiction of a minor engaging in sexually explicit conduct requires the defendant to know that the person depicted is a minor. The Court recognized that engaging in these activities was both innocent and constitutionally protected behavior unless the person depicted was a minor. After extensively discussing the inconclusive legislative history, this Court observed that "'criminal responsibility may not be imposed without some element of scienter on the part of the defendant,'" and concluded that "a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts." *Id.* at 78 (quoting *New York v. Ferber* 458 U.S. 747, 765 (1982)). The Court therefore "read the statute to eliminate those doubts" after concluding that such a reading was "not plainly contrary to the intent of Congress." *Id.*

The principle of constitutional avoidance here is closely related to – and arises from the same source as – the Court's general presumption that "a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U.S. at 72. That source is the historical principle that a crime requires both "a vicious will" and "an unlawful act," 4 William Blackstone, *Commentaries* *21; *Morissette*, 342 U.S. at 252-54 & nn.11-12. The Due Process Clause "specially protects those fundamental rights and liberties, which

are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The statutes here should be read in accordance with the plain text – requiring knowledge of both the status and possession elements – thus avoiding potential Due Process violations. Imposing severe criminal penalties on a defendant for conduct that would be innocent and potentially constitutionally protected if he or she were unaware of the status that criminalized his or her conduct raises grave constitutional concerns.

C. The Rule of Lenity Resolves Any Ambiguity in Mr. Rehaif's Favor.

When this Court's "recourse to traditional tools of statutory construction leaves any doubt about the meaning" of a criminal statute, it "invoke[s] the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)) (citations omitted). "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota*, 471 U.S. at 427. The text at issue is clear, particularly in light of the established framework for interpretation of *mens rea* requirements in criminal statutes. But if this Court disagrees, it should invoke the rule of lenity to resolve any ambiguity.

The Court has already charted this path in *Liparota*. There the Court interpreted a statute that provided "'whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the

regulations' is subject to a fine and imprisonment." *Id.* at 420. The question presented was "the mental state, if any, that the Government must show in proving that petitioner acted 'in any manner not authorized by [the statute] or the regulations.'" *Id.* at 423. The government argued that the requirement that the defendant act "knowingly" did *not* extend to the requirement that a defendant engage in the forbidden activities with coupons or authorization cards "in any manner not authorized by [the statute] or the regulations." *Id.*

After reviewing the text and structure of the relevant provisions, the Court found that "the words themselves provide little guidance. Either interpretation would accord with ordinary usage." *Id.* at 424. This Court nonetheless held that, "[a]bsent indication of contrary purpose in the language or legislative history of the statute, we believe that [the statute] requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations." *Id.* at 425.[8]

In so interpreting the text, the Court observed that the contrary interpretation would make a broad range of innocent conduct illegal. *Id.* at 426. Relevant here, it further explained:

> [R]equiring *mens rea* is in keeping with our longstanding recognition of the principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. Application of the rule of lenity ensures that criminal statutes will provide fair warning

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[8] *See also id.* at 433 ("We hold that in a prosecution for violation of [the statute], the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations.").

> concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.

Id. at 427 (internal quotation marks and citations omitted). This application of the rule of lenity in *Liparota* is particularly notable because it appears to have overcome another traditional interpretive doctrine – that "ignorance of the law is no excuse." *See Flores-Figueroa*, 556 U.S. at 652 (expressly noting this circumstance).

If the Court concludes the provisions here are ambiguous, "[t]he purposes underlying the rule of lenity—to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts—are certainly served by its application in this case." *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

III. THE ARGUMENTS SUPPORTING THE DECISION BELOW ARE NOT PERSUASIVE.

The court below relied on three main arguments. Each argument is flawed, and none overcomes the statutes' plain meaning and the clear import of this Court's cases.

A. Whether the "Knowingly Violates" Requirement Applies to the "Interstate Commerce" Element of § 922(g) Has No Bearing on the Resolution of the Issue Presented.

The court below asserted that the statutory provisions at issue are ambiguous by reasoning that the statutory *mens rea* would not apply to the "interstate commerce" element of § 922(g). Pet. App.

10a. The "interstate commerce" element is a jurisdictional, rather than a substantive, element of the offense. That the *mens rea* requirement would not apply to the jurisdictional element does nothing to undermine that the *mens rea* requirement applies to both substantive elements of the offense – status and possession.

Unlike the substantive status and possession elements, a jurisdictional element has long been excepted from the application of *mens rea*. On several occasions, this Court has distinguished "the substantive elements of a federal statute describ[ing] the evil Congress seeks to prevent" and "the jurisdictional element [that] connects the law to one of Congress's enumerated powers, thus establishing legislative authority." *Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016). The Court has explained that knowledge of jurisdictional facts – such as a connection to interstate commerce – is not generally required in federal criminal statutes. *See id.* at 1631 ("[C]ourts have routinely held that a criminal defendant need not know of a federal crime's interstate commerce connection to be found guilty" because "Congress viewed the commerce element as distinct from, and subject to a different rule than, the elements describing the substantive offense"); *United States v. Feola*, 420 U.S. 671, 676 n.9 (1975) ("[T]he existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.").

Put differently, this Court's general presumption that a *mens rea* requirement extends to all elements of the statute that define the criminal act does not include jurisdictional requirements. The presence of a jurisdictional fact may, for example, provide federal jurisdiction over an offense otherwise committed with

evil intent. *See id.* at 676. But a jurisdictional requirement is not an element defining the criminal activity itself. This Court's established treatment of the jurisdictional elements of federal criminal statutes therefore does not call into question the statutory interpretation set forth in Part I, above.

B. The Presumptive Requirement of a *Mens Rea* for All Substantive Elements of a Crime That Distinguish it From Innocent Behavior Extends to a Defendant's Status Under § 922(g).

The court below asserted that this Court's "presumption of *mens rea*" for all elements of an offense does not apply where a "defendant's knowledge of his own status offers little room for 'reasonable mistake.'" Pet. App 17a (quoting *X-Citement Video*, 513 U.S. at 72 n.2). The court observed that "no precedent" of this Court "requires the government to prove that the defendant knew of his own status." Pet. App. 17a.

This attempted distinction of *Morissette*, *Staples*, *Liparota*, and *X-Citement Video* is unavailing. Nothing in the decisions defines any category of elements of a crime that is excluded from the Court's overriding instruction that all elements of a crime that distinguish criminal from innocent behavior presumptively require a *mens rea*.

This Court's opinion in *X-Citement Video* discusses the potential relevance of "[t]he opportunity for reasonable mistake" to the common law decision not to require *mens rea* for certain sex offenses. 513 U.S. at 72 n.2. The opinion does not purport to speak to status generally or suggest that the Court's general interpretive presumption does not apply to federal statutes defining crimes. But, even assuming this

Court might not apply the presumption to statutes where there is no "opportunity for reasonable mistake," that point is misplaced in this case. Whether a defendant has committed a felony or engaged in an immigration violation is often complex and does not resemble an immutable personal characteristic.[9] There is thus no basis to assume, as the Eleventh Circuit did, that defendants always know their "status."

C. The Eleventh Circuit's Speculation About Congress's Purposes is not Grounded in Either the Text or Specific Legislative Statements of Purpose.

Finally, the court below relied on two speculative propositions about Congress's likely intent in enacting the relevant provisions: First, that "it is highly unlikely that Congress intended to make it easier for felons to avoid prosecution by permitting them to claim that they were unaware [of their status]." Pet. App. 17a (quoting *Langley*, 62 F.3d at 606). Second, that in light of Congress's "repeated efforts to fight violent crime and the commission of drug offenses, it is unlikely that Congress intended to make" enhancement of defendants' penalties harder. *Id.*

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[9] The court below sought to bolster this argument by pointing out that at common law, the crimes of statutory rape and bigamy involved strict liability about the defendant's own age and marital status. Pet. App. 14a-15a. That argument might have some force interpreting a federal statute criminalizing statutory rape and bigamy without including a required mental state. Here, it is inapt because common law tradition had no analogous firearms possession laws, because one's status under § 922(g) as, e.g., a felon or unlawful immigrant, is far more complex than age or marital status, and because Congress imposed a *mens rea* requirement for violations of § 922(g).

These general statements of congressional purpose, of course, cannot overcome the textual and other considerations described in Part I, above. In fact, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). Indeed, the purpose of adding the *mens rea* requirement here was to protect against prosecutions for inadvertent conduct. *See* Part II.A, *supra*. Requiring the government to prove that a defendant knew his status may result in the government having to marshal a modicum of additional evidence. But that burden is consistent with the text and purpose of the statutes and separates unlawful from innocent conduct.

The court below nonetheless presumed that Congress did not intend to make it more difficult for the government to prove that the defendant has the requisite knowledge. This Court described such a concern as one of "practical importance" in *Flores-Figueroa*, 556 U.S. at 655. But, the Court continued, this practical problem is not "sufficient . . . to turn the tide in the Government's favor," explaining, *inter alia*, that "concerns about practical enforceability are insufficient to outweigh the clarity of the text. Similar interpretations we have given other similarly phrased statutes also create practical enforcement problems." *Id.* at 656 (citing *X-Citement Video*, 513 U.S. 64; *Liparota*, 471 U.S. 419). In words that are apt here, the Court continued that "had Congress placed conclusive weight upon practical enforcement, the statute would likely not read the way it now reads. Instead, Congress used the word 'knowingly' followed by a list of offense elements." *Id.* at 656-67.

Here, similar to *Flores-Figueroa*, Congress requires the government to prove a defendant "knowingly violate[d]" § 922(g) before he or she can be punished under § 924(a)(2). The text is clear, and the government should be required to prove both that the defendant knew his status and that the defendant knew he possessed a firearm, the two substantive elements of a § 922(g) violation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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No. 17-9560

In the Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an alien who is illegally or unlawfully in the United States and knowingly possesses a firearm or ammunition thereby "knowingly violates," 18 U.S.C. 924(a)(2), the federal prohibition against possession of a firearm or ammunition by "an alien * * * illegally or unlawfully in the United States," 18 U.S.C. 922(g)(5)(A).

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In the Supreme Court of the United States

No. 17-9560

HAMID MOHAMED AHMED ALI REHAIF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 888 F.3d 1138. A prior opinion of the court of appeals (Pet. App. 21a-37a) is reported at 868 F.3d 907.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2018. The petition for a writ of certiorari was filed on June 21, 2018, and the petition was granted on January 11, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-53a.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was

convicted on two counts of possession of a firearm and ammunition by an alien unlawfully in the United States, in violation of 18 U.S.C. 922(g)(5)(A) and 924(a)(2). Judgment 1. The district court sentenced petitioner to 18 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-20a.

A. Petitioner's Offenses

1. In August 2013, petitioner, a citizen of the United Arab Emirates, entered the United States on an F-1 nonimmigrant student visa to study mechanical engineering at the Florida Institute of Technology (Florida Tech). Pet. App. 2a; D. Ct. Doc. 73-6; 5/16/16 Tr. 214. Before his entry, petitioner signed a form in which he certified that he sought "to enter or remain in the United States temporarily, and solely for the purpose of pursuing a full course of study" at Florida Tech. D. Ct. Doc. 73-4; see Pet. App. 2a-3a; 5/16/16 Tr. 210, 237-239.

Petitioner also certified that he had "read and agreed to comply with the terms and conditions of [his] admission" to the United States, including a condition that he remain "enrolled as a full-time student" in order to maintain his "nonimmigrant student status." D. Ct. Doc. 73-3, at 1-2; D. Ct. Doc. 73-4; see Pet. App. 2a. Petitioner further acknowledged that a failure to comply with that requirement would "result in the loss of [his] student status and subject [him] to deportation." D. Ct. Doc. 73-3, at 2; see D. Ct. Doc. 73-4.

During his first year at Florida Tech, petitioner failed or withdrew from every class he took, prompting the school to "academically dismiss[]" him in May 2014. 5/16/16 Tr. 225-226; see D. Ct. Doc. 73-9. After petitioner appealed that dismissal, Florida Tech condition-

ally readmitted him for the fall 2014 semester, but petitioner continued to underperform, earning four Fs and a D that term. 5/16/16 Tr. 226; D. Ct. Doc. 73-9. On December 17, 2014, Florida Tech again academically dismissed petitioner, and petitioner did not appeal that dismissal. Pet. App. 3a; 5/16/16 Tr. 191-192, 221.

On January 21, 2015, Florida Tech sent petitioner emails informing him that, in light of his academic dismissal, his "immigration status w[ould] be terminated on February 5, 2015," unless he transferred to another university or notified Florida Tech that he had already left the United States. D. Ct. Docs. 73-7, 73-8; see 5/16/16 Tr. 218. The school was required to report petitioner's standing in a computerized tracking system administered by the Department of Homeland Security. 5/16/16 Tr. 236-237, 241. Petitioner took no action in response to the emails, and on February 23, 2015, a designated Florida Tech official marked petitioner's record in the federal tracking system as "terminated." Pet. App. 3a; D. Ct. Doc. 73-10, at 2; 5/16/16 Tr. 191.

2. As petitioner had been warned, because he was no longer pursuing his course of study at Florida Tech, petitioner lost his lawful F-1 nonimmigrant status and was required to "depart the country in a timely manner." 5/16/16 Tr. 241; see *id.* at 240-242; Pet. App. 3a. Although petitioner's student visa listed an expiration date of July 2017, see D. Ct. Doc. 73-6, the visa was "a travel document" that did not authorize petitioner to remain in the country once his student status changed, 5/16/16 Tr. 239-240. Instead of leaving the country, however, petitioner remained in the United States and became a regular guest at the Hilton Rialto Hotel in Melbourne, Florida, eventually staying there "for months at a time." 5/17/16 Tr. 15; see *id.* at 13-15; Pet.

App. 3a. While there, he gave two different hotel employees nine-millimeter bullets as gifts. 5/17/16 Tr. 13-17, 23-24, 27-28.

On December 2, 2015, having stayed in the United States more than nine months after the termination of his lawful immigration status, petitioner visited a shooting range in Melbourne. Pet. App. 3a; D. Ct. Doc. 73-17; 5/17/16 Tr. 47, 53-55. At the shooting range, petitioner bought a box of nine-millimeter ammunition, rented a Glock firearm for one hour, and fired that gun at a paper target. Pet. App. 3a; D. Ct. 73-17; 5/17/16 Tr. 52-61. Midway through the hour, petitioner traded that gun for another Glock firearm, also provided by the shooting range, and continued to shoot at the target with the new gun. 5/17/16 Tr. 62-66.

3. Six days after petitioner practiced at the shooting range, a Hilton employee called the police to report that petitioner had been acting suspiciously. Pet. App. 3a; 5/17/16 Tr. 33, 97. The employee explained that petitioner had been staying at the hotel for 53 nights, checking out every morning and then checking back in each night into a different room, and spending over $11,000 in cash on room fees. Presentence Investigation Report (PSR) ¶ 7. According to the hotel employee, petitioner always requested an eighth-floor room that faced the airport. *Ibid.* The employee also reported that petitioner had given ammunition to hotel employees and had recently claimed to have weapons in his room. PSR ¶¶ 7-8.

On receiving that information, agents with the Federal Bureau of Investigation visited the hotel and encountered petitioner in the lobby. 5/17/16 Tr. 98, 104. Petitioner agreed to speak to the agents and told them that he had been academically dismissed from Florida Tech after the fall 2014 semester. *Id.* at 98-99. After

initially claiming that he was now a student at a different university, petitioner eventually admitted that he was not attending any college. *Id.* at 99. He also admitted that "he was aware that * * * he was out of status for his immigration" because he was no longer enrolled in school. *Id.* at 101; see *id.* at 99; Pet. App. 4a.

Petitioner further admitted that he had fired two guns at the shooting range and had ammunition in his hotel room. Pet. App. 4a; 5/17/16 Tr. 31, 33-34, 98-100. Petitioner added that he had previously purchased three firearms—a Cobra .380, a Hi-Point 9mm, and one other gun of a type he could not recall—but had sold or given them away within the previous few months. PSR ¶¶ 10-11, 14. Petitioner consented to a search of his hotel room, where agents found the remaining ammunition that petitioner had purchased at the shooting range. Pet. App. 4a; 5/17/16 Tr. 31, 33-34, 100. Petitioner also consented to a search of his storage unit, where agents recovered 184 rounds of .223 and nine-millimeter ammunition that petitioner had placed there. PSR ¶ 15.

B. District Court Proceedings

1. Under 18 U.S.C. 922(g), it is "unlawful for any person" who falls within one of several enumerated categories to "possess in or affecting commerce[] any firearm or ammunition." The categories of people prohibited from possessing firearms and ammunition include "any person * * * who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. 922(g)(1), as well as "any person * * * who, being an alien * * * (A) is illegally or unlawfully in the United States; or (B) [with certain exceptions] has been admitted to the United States under a nonimmigrant visa," 18 U.S.C. 922(g)(5).

A grand jury indicted petitioner on two counts of possession of a firearm or ammunition by an alien unlawfully in the United States, in violation of 18 U.S.C. 922(g)(5)(A) and 924(a)(2), based on petitioner's possession of a Glock firearm at the shooting range and the ammunition in his hotel room. Indictment 1-2. Section 924(a)(2) provides that "[w]hoever knowingly violates" Section 922(g) or various neighboring firearm prohibitions "shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. 924(a)(2). The indictment alleged a violation of 18 U.S.C. 922(g)(5)(A) because petitioner's student status terminated long before he possessed the firearm and ammunition, rendering him an alien "illegally or unlawfully in the United States."

2. Before trial, the government asked the district court to instruct the jury that "[t]he United States is not required to prove that [petitioner] knew he was illegally or unlawfully in the United States." D. Ct. Doc. 53, at 33. Petitioner objected and asserted that the government bore the burden of proving both that he knowingly possessed the firearm and ammunition and that, at the time of possession, he was aware of his unlawful immigration status. Pet. App. 4a-5a. The court overruled petitioner's objection. *Id.* at 5a.

At trial, the district court instructed the jury that, to find petitioner guilty, it had to find proof beyond a reasonable doubt that (1) petitioner "knowingly possessed" a firearm or ammunition; (2) he possessed the firearm or ammunition "in or affecting interstate commerce," and (3) "before possessing the firearm or ammunition, [he] was an alien illegally or unlawfully in the United States." 5/17/16 Tr. 168; see *id.* at 168-169. The court

also told the jury that "[t]he United States is not required to prove [petitioner] knew that he was illegally or unlawfully in the United States." *Id.* at 170.

3. The jury found petitioner guilty on both counts. Verdict 1. The district court sentenced petitioner to 18 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3.

C. Court of Appeals Proceedings

On August 17, 2017, the court of appeals issued an initial opinion affirming petitioner's convictions. Pet. App. 21a-37a. Petitioner filed a petition for rehearing; while that petition was pending, the court vacated its initial opinion and "substituted a new one." *Id.* at 39a. Because the new opinion "contain[ed] substantial revisions," the court denied petitioner's rehearing petition as moot. *Ibid.*

In the new opinion, the court of appeals again affirmed. Pet. App. 1a-20a. The court identified three elements of an 18 U.S.C. 922(g) violation: (1) "the status element," *i.e.*, whether "the defendant falls within one of the categories listed in the § 922(g) subdivisions"; (2) "the possession element," *i.e.*, whether "the defendant possessed a firearm or ammunition"; and (3) the jurisdictional element, *i.e.*, whether "the possession was 'in or affecting [interstate or foreign] commerce.'" Pet. App. 8a (quoting 18 U.S.C. 922(g)) (internal quotation marks omitted). The court adhered to its prior decision in *United States* v. *Jackson*, 120 F.3d 1226 (11th Cir. 1997), which had determined that conviction for a criminal violation of Section 922(g) does not require proof of a defendant's knowledge of his own status (there, as a felon). Pet. App. 11a & n.2. The court indicated that it might recognize a mistake-of-fact defense, but observed that "such defense is not alleged here." *Id.* at 15a n.5.

The court of appeals reasoned that "[t]extual support, prior precedent, congressional acquiescence, and analogous common law" uniformly counseled against applying a mens rea requirement to the status element of 18 U.S.C. 922(g). Pet. App. 17a; see *id.* at 8a-18a. The court took note of the "longstanding uniform body of precedent holding that the government does not have to satisfy a mens rea requirement with respect to the status element of § 922," *id.* at 12a, and observed that, "despite ample opportunity to do so, Congress has never revisited the issue" to express dissatisfaction with the prevailing judicial construction, *id.* at 13a. The court further explained that, "even at common law and [under] early American law, the government did not have the burden of proving that the defendant knew a specific fact or detail about himself." *Id.* at 14a.

SUMMARY OF ARGUMENT

As the courts of appeals have consistently recognized, a prosecution for unlawful possession of a firearm under 18 U.S.C. 922(g) and 924(a)(2) does not require the government to prove a defendant's knowledge of his legal status or personal circumstances. Instead, the text and structure of the statute adhere to the well-settled principle that a defendant typically cannot avoid criminal liability by claiming ignorance of the law, as well as the common presumption that a defendant knows his own personal history. The absence of any requirement to prove such knowledge was central to this Court's decision in *Old Chief* v. *United States*, 519 U.S. 172 (1997), and reflects Congress's codification of the preexisting and longstanding judicial consensus. Petitioner's contrary interpretation disregards the statutory structure,

would effectively overrule *Old Chief*, and would transform firearm-possession trials into extended explorations of the unattractive details of the defendant's past.

Section 922(g) makes it "unlawful" for people with specified background circumstances—including felons, fugitives, and aliens illegally in the United States—to ship, transport, possess, or receive firearms or ammunition in interstate or foreign commerce. As a regulatory prohibition designed to keep guns out of potentially dangerous hands, Section 922(g) itself does not require any particular mens rea. Congress *did* include express mens rea requirements in neighboring regulatory provisions, *e.g.*, 18 U.S.C. 922(d), (h), (i), and (j), but conspicuously omitted one from Section 922(g). Someone's recklessness or negligence about his own status as a felon, or as an alien illegally or unlawfully in the United States, does not exempt him from Section 922(g)'s firearm prohibition.

The criminal penalties prescribed in Section 924(a)(2) for someone who "knowingly violates" Section 922(g), intern, require proof that the defendant had knowledge of his offense conduct—the shipping, transporting, possessing, or receiving of a firearm or ammunition—not his own background. Just as Section 924(a)(2) imposes no mens rea requirement on the jurisdictional element of Section 922(g) (*i.e.*, the item's movement in interstate or foreign commerce), it does not do so for the circumstances that made the defendant ineligible to possess a firearm. Ignorance of the law is rarely ever a defense, except where Congress says that a crime must be committed "willfully"—as it did elsewhere in the same subsection, 18 U.S.C. 924(a)(1)(D), but did not do in Section 924(a)(2). And the text and structure of Sections 924(a)(2)

and 922 illustrate that the "knowingly" requirement does not refer to background circumstances.

Section 924(a)(2) applies not only to someone who "knowingly violates" Section 922(g), but also anyone who "knowingly violates" Sections 922(d), (i), or (j). Those provisions are part of the same regulatory regime as Section 922(g), but instead of applying irrespective of someone's mens rea, they apply only where someone "know[s] or ha[s] reasonable cause to believe" that particular background circumstances exist. 18 U.S.C. 922(d), (i), and (j). It makes no sense to apply Section 924(a)(2)'s "knowingly" requirement to those background circumstances; a person cannot "*knowingly* know or have reasonable cause to believe" something. And if the singular phrase "knowingly violates" refers only to conduct with respect to Sections 922(d), (i), and (j), it must have the same meaning with respect to Section 922(g). That textual inference makes particular sense given that the background circumstances referenced in 922(g) are all legal and personal qualities, like immigration status, as to which the law typically presumes knowledge.

This Court's decision in *Old Chief* was accordingly premised on the understanding that a criminal prosecution for violating Section 922(g) requires proof only that the defendant *had* a particular status—not that he *knew* his status. There, the Court held that a defendant in a firearm-possession prosecution must be allowed to stipulate to his status as a convicted felon under 18 U.S.C. 922(g)(1), reasoning that allowing the government to introduce evidence of the nature of his past crime would risk unfair prejudice in return for little if any probative benefit. Crucial to the Court's decision was that a defendant's "legal status," as a person ineligible to possess

a firearm, is "an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense." 519 U.S. at 190-191. The Court made clear that if evidence about the nature of his past crime were relevant to proof of "knowledge," the government could insist on introducing it. *Id.* at 190 (citation omitted).

The Court's understanding in *Old Chief* accords not only with the statutory text and structure, but also with the long history of federal firearm regulation. Courts have for decades interpreted the criminal penalties for violating federal firearms laws to require knowledge of conduct, but not of status. Congress added the "knowingly violates" language in 1986 to codify that understanding, clarifying that Section 922(g) was not subject to the separate willfulness requirement that Congress was then adding for prosecuting other (more technical) firearm violations. Courts since 1986 have thus uniformly continued to understand that proof of knowledge is required only as to the defendant's conduct. If that continuation of preexisting practice were in fact the *opposite* of what Congress intended, its 1986 enactment to accomplish it presumably would have addressed such a severe misunderstanding in one of the many amendments that it has made to Sections 922 and 924 during that time.

Congress had good reason to maintain the longstanding approach to firearm-possession prosecutions. Few defendants will actually lack knowledge of their own status (*e.g.*, as felons, fugitives, or aliens in the United States unlawfully), and federal licensing and other laws are designed to put them on notice of regulatory requirements. But *proving* such knowledge at trial will often be complicated, requiring introduction of

evidence extraneous to the defendant's illegal firearm possession—in the case of felons, for instance, evidence of past offenses. As *Old Chief* understood, that evidence is likely to distract jurors or lead them into a prejudicial chain of bad-character reasoning.

Petitioner's argument that such evidence is in fact required rests almost exclusively on his erroneous importation of the word "knowingly" from Section 924(a)(2) into Section 922(g), albeit only partway (because he skips over jurisdictional elements). But petitioner cannot explain how "knowingly" would apply to phrases within Section 922(g) that have different verb tenses, or how it should apply to other subsections that have express mens rea requirements of their own. And petitioner's reading would suggest a highly anomalous scheme in which firearm dealers have a greater duty to investigate the circumstances of their customers than the customers themselves have.

Finally, even if petitioner were correct that the government had to prove his knowledge that he was "illegally or unlawfully in the United States," 18 U.S.C. 922(g)(5)(A), any error was harmless on this record. Petitioner certified on entering the United States that he was required to remain a fulltime student; following his dismissal from Florida Tech, the school informed him that his immigration status would be terminated; and after lying to law enforcement about having transferred to a different school, petitioner admitted that he knew he was out of status.

ARGUMENT

Petitioner was subject to criminal penalties under the federal firearm laws because he was an alien "illegally or unlawfully in the United States," 18 U.S.C. 922(g)(5)(A), who possessed a firearm and ammunition "knowingly," 18 U.S.C. 924(a)(2). In enacting Sections 922(g)(5)(A) and 924(a)(2), Congress did not take the unusual step of requiring proof that the defendant had subjective awareness of his legal status. Nor did it indulge a presumption that a defendant is unaware of his own personal history and characteristics, and thereby provide a safe harbor for aliens who are reckless or negligent about their immigration status. Instead, Section 922(g) prohibits certain people from particular firearm-related conduct irrespective of mens rea, and Section 924(a)(2) prescribes criminal penalties for anyone who "knowingly violates" that provision by engaging in such conduct.

Even petitioner does not contend that Section 924(a)(2) requires proof of a defendant's knowledge *that he is violating* Section 922(g); he instead suggests an atextual transposition of the word "knowingly" into every element of a Section 922(g) violation (skipping jurisdictional ones). But such linguistic surgery would disrupt the statutory scheme, which already includes explicit status-related mens rea requirements where Congress wanted them. It would also upset this Court's precedent —which has presumed that knowledge of status is not required—by turning firearm-possession trials into inquests into the unsympathetic details of a defendant's past history. The decision below, which reflects the long-held, universal understanding of the firearm laws, should be affirmed.

I. THE KNOWLEDGE REQUIREMENT OF 18 U.S.C. 924(a)(2) APPLIES TO A DEFENDANT'S OFFENSE CONDUCT, NOT HIS LEGAL STATUS

The federal firearms laws both regulate primary conduct and impose criminal penalties for certain violations. As to the former, 18 U.S.C. 922(g) prohibits certain people from particular acts of "ship[ping]," "transport[ing]," "possess[ing]," or "receiv[ing]" firearms, irrespective of their mens rea. As to the latter, anyone who "knowingly violates" Section 922(g) or certain neighboring regulatory provisions is subject to zero to ten years in prison, 18 U.S.C. 924(a)(2), and anyone with a particular criminal history who "violates" Section 922(g) is subject to 15 years to life in prison, 18 U.S.C. 924(e)(1). The "knowingly" requirement, which appears only in Section 924(a)(2), was added in 1986 to codify the preexisting judicial consensus regarding the mens rea required for an *act* that violates Section 922(g), distinguishing it from the "willful[]" mens rea required under other provisions of Section 924, see, *e.g.*, 18 U.S.C. 924(a)(1)(D). Petitioner errs in reading it instead to impose a new mens rea requirement that would apply to a firearm defendant's status. That reading would unrealistically presume a defendant to be unaware of his own personal characteristics, would require proof of knowledge that all but the rarest defendants will in reality have, and would—by requiring the Court to revisit *Old Chief* v. *United States*, 519 U.S. 172 (1997)—make the facts surrounding the defendant's dangerousness (rather than his firearm-related conduct) the focus of a firearm prosecution.

A. Section 922(g)'s Regulatory Prohibition Of Firearm-Related Conduct By Certain Categories Of People Applies Irrespective Of A Regulated Person's Mens Rea

Section 922(g) itself is a regulatory prohibition on certain activities involving firearms and ammunition. Unlike other neighboring regulatory provisions, it does not contain any mens rea requirement.

1. Under Section 922(g), "[i]t shall be unlawful for any person" who satisfies any of several sets of criteria "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. 922(g).

The classes of people subject to that prohibition include persons who have been "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. 922(g)(1); persons who are "fugitive[s] from justice," 18 U.S.C. 922(g)(2); persons who "ha[ve] been adjudicated as * * * mental defective[s] or who ha[ve] been committed to a mental institution," 18 U.S.C. 922(g)(4); and persons "convicted in any court of a misdemeanor crime of domestic violence," 18 U.S.C. 922(g)(9). They also include "any person * * * who, being an alien * * * (A) is illegally or unlawfully in the United States; or (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa," 18 U.S.C. 922(g)(5).

Section 922(g)'s prohibitions are not contingent on mens rea. The provision does not include any such requirement explicitly, and a mens rea requirement cannot be inferred implicitly. The presumption of mens rea that may apply when a defendant faces "punishment for a harmful act," *Morissette* v. *United States*, 342 U.S.

246, 250-251 (1952), does not apply to a regulatory provision that merely specifies whether certain conduct is lawful, without attaching any punishment. It would not be sensible to construe Section 922(g) as, for example, allowing someone "adjudicated as a mental defective," 18 U.S.C. 922(g)(4), to possess a gun, so long as his mental deficiency precludes him from remembering the adjudication. Nor would an alien unlawfully in the United States be entitled under Section 922(g)(5)(A) to possess a gun, where he is reckless or negligent about his immigration status.

As this Court has recognized, Section 922(g) is designed "to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 112 (1983) (citations and internal quotation marks omitted); see, *e.g.*, *Small* v. *United States*, 544 U.S. 385, 393-394 (2005); *Lewis* v. *United States*, 445 U.S. 55, 60-62, (1980); *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974). Nothing in Section 922(g), either textually or otherwise, suggests that someone who falls into a class deemed to present such a danger would be entitled to possess a gun based on his lack of self-awareness about the circumstances that make him dangerous. Rather, "the persons Congress classified as potentially irresponsible and dangerous * * * are comprehensively barred by the [statute] from acquiring firearms by any means." *Barrett* v. *United States*, 423 U.S. 212, 218 (1976).

2. The absence of any mens rea requirement in Section 922(g) itself is particularly instructive when compared to other neighboring firearm regulations that *do* contain such requirements. "Where Congress includes particular language in one section of a statute but omits

it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted); see, *e.g.*, *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (same).

Under Section 922(d), for example, it is unlawful "to sell or otherwise dispose of" a firearm to another person "*knowing or having reasonable cause to believe* that such person" falls within many of the same status categories identified in Section 922(g)—including where the recipient is an alien "illegally or unlawfully in the United States." 18 U.S.C. 922(d)(5)(A) (emphasis added). Section 922(d)(5)(A) is thus essentially parallel to Section 922(g)(5)(A), except that it provides a mens rea requirement ("knowing or having reasonable cause") that applies to the background circumstance that makes the conduct (disposing of a firearm) unlawful.

Other nearby statutory firearm prohibitions likewise contain express mens rea requirements with respect to background circumstances. Under 18 U.S.C. 922(h), it is "unlawful for any individual, *who to that individual's knowledge* and while being employed for any person" covered by Section 922(g), to engage in certain firearms-related activities in the course of that employment. *Ibid.* (emphasis added). And under Sections 922(i) and (j), it is "unlawful for any person" to engage in certain activities with respect to stolen firearms or ammunition "*knowing or having reasonable cause to believe* that the firearm or ammunition was stolen." 18 U.S.C. 922(i) and (j) (emphasis added). Those express mens rea requirements in Section 922(g)'s neighboring provisions provide additional reason not to read one into

Section 922(g) itself, which conspicuously omits any such requirement from its text.

B. A Person "Knowingly Violates" Section 922(g) If He Is Covered By That Provision And Knowingly Engages In The Conduct That It Prohibits

The only textual mens rea requirement that applies in the context of a Section 922(g) prosecution appears in Section 924(a)(2), which specifies criminal penalties for certain violations of a number of regulatory firearms provisions. Section 924(a)(2) provides that "[w]hoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." As this Court's precedent reflects, the phrase "knowingly violates" refers to the mens rea for the *conduct* comprising the violation, rather than to the mens rea for the background circumstances.

1. Statutory text, structure, and context illustrate that Section 924(a)(2)'s knowledge requirement applies only to a defendant's conduct

Section 924(a)(2) applies to a defendant who "knowingly violates" one of several covered regulatory provisions. As previously discussed, some of those provisions specify a mens rea that must be established for background circumstances, while others—like Section 922(g), the provision at issue here—apply irrespective of mens rea as to background circumstances. The only knowledge that Section 924(a)(2) thus requires for a violation of Section 922(g) is knowledge of the violative conduct—namely, shipping, transporting, possessing, or receiving a firearm or ammunition. That interpretation reflects

general principles under which criminal statutes typically do not require the prosecution to prove that a defendant knows his own legal status or personal history.

a. As petitioner appears to recognize (because he does not argue otherwise), the phrase "knowingly violates" does not literally require proof of knowledge that the defendant's conduct *is* a violation of the regulatory prohibition—*i.e.*, proof that a defendant knew his conduct to be illegal. Any contrary contention could not be squared with this Court's construction of the same term ("knowingly") in the preceding statutory paragraph, 18 U.S.C. 924(a)(1). "With respect to the * * * categories of conduct that are made punishable by [Section 924(a)(1)], if performed 'knowingly,'" the Court explained, "the background presumption that every citizen knows the law makes it unnecessary to adduce specific evidence to prove that 'an evil-meaning mind' directed the 'evil-doing hand.'" *Bryan* v. *United States*, 524 U.S. 184, 193 (1998). The same meaning of "knowingly" accordingly holds for Section 924(a)(2), which was in fact originally part of Section 924(a)(1). See 18 U.S.C. 924(a)(1)(B) (Supp. IV 1986) (original location); see also Pub. L. No. 100-690, § 6462, 102 Stat. 4374 (reorganization); *Robers* v. *United States*, 572 U.S. 639, 643 (2014) ("Generally, identical words used in different parts of the same statute are presumed to have the same meaning.") (citations, ellipsis, and internal quotation marks omitted).

The principle that "ignorance of the law or a mistake of law is no defense to criminal prosecution" is "deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991); see *Barlow* v. *United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (rejecting mistake-

of-law defense because "[t]he whole course of the jurisprudence, criminal as well as civil, of the common law, points to a different conclusion"). "Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law." *Cheek*, 498 U.S. at 199; see O. W. Holmes, Jr., *The Common Law* 48 (1881) ("[T]o admit the excuse [of ignorance] at all would be to encourage ignorance where the law-maker has determined to make men know and obey."). Congress may choose to deviate from that presumption, for instance by specifying that a crime must be committed "'willfully,'" a term that may connote the "intentional violation of a known legal duty." *United States* v. *Bishop*, 412 U.S. 346, 360 (1973). But unless Congress clearly indicates that it is "carving out an exception," statutory language must be construed in light of "the traditional rule." *Cheek*, 498 U.S. at 200.

Congress did in fact use the term "willfully" elsewhere in Section 924(a). Section 924(a)(1)(D) is a catch-all clause that prescribes punishment for anyone who "willfully violates any other provision of this chapter," 18 U.S.C. 924(a)(1)(D), thereby supplementing the portions of Section 924 that attach more-specific punishments to violations of other regulatory provisions. "[T]he term 'willfully' in § 924(a)(1)(D) requires a defendant to have 'acted with knowledge that his conduct was unlawful.'" *Dixon* v. *United States*, 548 U.S. 1, 5 (2006) (quoting *Bryan*, 524 U.S. at 192). But the same is not true for a "knowing[]" violation covered by Section 924(a)(2). See *Russello*, 464 U.S. at 23; see also *Bryan*, 524 U.S. at 193.

b. The knowledge requirement of Section 924(a)(2) is instead satisfied when the defendant knowingly commits the act or acts underlying the regulatory violation—

i.e., shipping, transporting, possessing, or receiving a firearm or ammunition. The Court has explained that "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Bryan*, 524 U.S. at 193 (footnote omitted). And in the context of a violation of Section 922(g), "the defendant's status"—*e.g.*, as a felon or an unlawful alien—is "an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense." *Old Chief*, 519 U.S. at 191.

Although a defendant's status is an element of a criminal offense defined by Sections 922(g) and 924(a)(2), "different elements of the same offense can require different mental states," *Staples* v. *United States*, 511 U.S. 600, 609 (1994). Petitioner accordingly acknowledges (Br. 31-32) that at least one element of the offense—the requirement of a connection to interstate or foreign commerce, see 18 U.S.C. 922(g)—does not require any showing of mens rea. As he recognizes, mens rea requirements often do not attach to jurisdictional elements, see *Torres* v. *Lynch*, 136 S. Ct. 1619, 1631 (2016), and the application of that general rule here undermines any possible textual inference that the "knowingly" mens rea applies to every element.

The structure of the statute shows that background circumstances, like the defendant's status, are likewise excluded. As discussed above, the range of regulatory provisions to which Section 924(a)(2) applies includes some that require mens rea as to background circumstances and some that do not. The word "knowingly" in Section 924(a)(2) cannot be construed to overwrite those separate legislative choices. Applying a "knowingly" requirement to the background circumstances

underlying violations of provisions like Sections 922(d), (i), and (j), which already specify that a particular prohibition applies only when someone "know[s] or ha[s] reasonable cause to believe" that the relevant circumstance exists, produces a textual muddle. A person cannot sensibly "*knowingly* know or have reasonable cause to believe" something. Instead, with respect to those regulatory provisions, "knowingly violates" must refer to the acts, and not to the background circumstances. And if that singular phrase has that meaning with respect to some of the covered regulatory violations, it should have that same meaning with respect to all of them. See *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005).

Differential application of the "knowingly" requirement to Section 922(g), as compared to regulatory provisions with more explicit mens rea requirements, would not only be textually incongruous but would produce unsound results. Under such a regime, the government could convict a firearm *seller* who has only "reasonable cause" to know that the purchaser is an alien unlawfully in the United States, see 18 U.S.C. 922(d)(5)(A), but could not convict *the purchaser himself* unless it proves that he has actual knowledge of his own immigration status, see 18 U.S.C. 922(g)(5)(A). Congress could not have intended to impose a knowledge requirement for prosecuting aliens (or felons, or other categories of regulated people), but a negligence requirement for those who unwittingly deal with them.

c. Requiring knowledge of the background circumstance of a defendant's status, in the context of a prosecution for a violation of Section 922(g), would be anomalous in other ways as well. To begin with, this Court has repeatedly rejected arguments "that the prosecution must prove a defendant's knowledge of the legal

status" of items, persons, or actions as a prerequisite to a criminal conviction, *Hamling* v. *United States*, 418 U.S. 87, 121 (1974), including when construing statutes that punish defendants who act "knowingly." See, *e.g.*, *United States* v. *International Minerals & Chem. Corp.*, 402 U.S. 558, 561-565 (1971); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342-343 (1952); see also *Boyce Motor Lines*, 342 U.S. at 345 (Jackson, J., dissenting). Here, the fact that someone is an "alien * * * illegally or unlawfully in the United States," 18 U.S.C. 922(g)(5)(A), is plainly a "legal" status, as the Court has understood that concept.

In addition, as the court of appeals recognized (Pet. App. 15a), the typical practice is that "the government need not prove that the defendant knew *his own status*, even when this status is what brings the defendant within the ambit of a criminal law." For example, a person who is "at least eighteen years of age" faces enhanced criminal penalties if he knowingly and intentionally uses a person under 18 years of age to avoid detection for a federal drug offense. 21 U.S.C. 861(a)(2); see 21 U.S.C. 861(b) and (c). The government, however, need not prove beyond a reasonable doubt that the defendant knew his own age (or, indeed, the age of the juvenile used in the crime). See *United States* v. *Chin*, 981 F.2d 1275, 1279-1280 (D.C. Cir. 1992) (R.B. Ginsburg, J.) ("It is implausible that Congress would have placed on the prosecution the often impossible burden of proving, beyond a reasonable doubt, that a defendant knew the youth he enticed was under eighteen."), cert. denied, 508 U.S. 923 (1993). Nor, for example, need the government prove self-knowledge of status by a "public official" who accepts a bribe, 18 U.S.C 201(b)(2); by "an officer, employee, contractor, or consultant of the United States"

who misappropriates classified materials, 18 U.S.C. 1924(a); or by a "parent, legal guardian, or person having custody or control of a minor" who allows the minor to be used for child pornography, 18 U.S.C. 2251(b).

Little reason exists to conclude that Congress deviated from its normal approach and required proof that a defendant knew his own personal attributes as a prerequisite for a conviction here. Federal law prohibits the entry of an alien into the United States except as authorized by law, see 8 U.S.C. 1185(a)(1), 1325(a) and (b), and aliens arriving at our borders are generally charged with the burden of showing that they are "clearly and beyond a doubt entitled to be admitted," 8 U.S.C. 1225(b)(2)(A); see 8 U.S.C. 1361 ("[T]he burden of proof shall be upon such person to establish that he * * * is not inadmissible [and] * * * that he is entitled to the nonimmigrant * * * status claimed."). An alien may gain admission as a nonimmigrant only "for such time and under such conditions" as the relevant regulations prescribe, and he must "depart from the United States" "at the expiration of such time or upon failure to maintain the status under which he was admitted." 8 U.S.C. 1184(a)(1). An alien "who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted," 8 U.S.C. 1227(a)(1)(C)(i), is accordingly removable and under a continuing legal obligation to leave the country.

Federal law imposes numerous restrictions based on immigration status, and people are expected to know their status so that they avoid engaging in prohibited conduct. For example, all noncitizens (and all felons) are ineligible to serve on federal juries, 28 U.S.C. 1865(b)(1) and (5), and they must disclose that status if called for jury service, see 28 U.S.C. 1864(a), 1865(a);

Edmonson v. *Leesville Concrete Co.*, 500 U.S. 614, 622-623 (1991) (describing federal jury-selection process). Aliens who are illegally or unlawfully in the United States are also ineligible for many federal, state, and local public benefits, including public assistance, unemployment benefits, and government grants, contracts, and loans, see 8 U.S.C. 1611, 1621(a) and (c)(1), 1641(b), and thus should not apply for them. In addition, aliens are generally barred from voting in federal elections, and aliens who violate that restriction are subject to prosecution. 18 U.S.C. 611(a) and (b). Even an alien who "reasonably believed at the time of voting * * * that he or she was a citizen of the United States" commits a crime by voting, except in the narrow circumstance where the alien is also the child of United States citizens and permanently resided in the United States before the age of 16. 18 U.S.C. 611(c). Similarly narrow reasonable-belief exceptions appear in certain other statutes that impose penalties or adverse immigration consequences on aliens who engage in prohibited conduct. See, *e.g.*, 8 U.S.C. 1182(a)(6)(C)(ii) (bar on admission to the United States of aliens who falsely represent themselves to be United States citizens); 8 U.S.C. 1227(a)(3)(D) (providing for deportation of aliens making false claims of United States citizenship); 18 U.S.C. 1015(f) (criminal prohibition on knowingly making a false claim of United States citizenship in order to vote).

Here, in contrast, where Congress did not include such an exception, the normal presumption of knowledge of one's own background or status should apply. A defendant in a prosecution for violating Section 922(g)(5)(A) may put the government to its proof that he actually *was* illegally or unlawfully in the United States. See, *e.g.*, Nat'l Immigrant Justice Ctr. (NIJC)

Amicus Br. 9-10. But he may not rely on the complexities of that law to mount a mistake-of-law defense. See, *e.g.*, *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015) ("The familiar maxim that 'ignorance of the law is no excuse' typically holds true."). His disregard or ignorance of the circumstances that give rise to a legal obligation to depart the United States does not entitle him to escape liability for illegally possessing a firearm while he remains.

2. This Court has understood that a prosecution for violating Section 922(g) requires knowledge only as to conduct

Although this Court has not directly held that knowledge of conduct is sufficient to establish a criminal violation of Section 922(g), it has explicitly relied on that understanding. Indeed, the Court's decision in *Old Chief* v. *United States*, *supra*, is entirely dependent on that premise.

The defendant in *Old Chief* was charged with being a convicted felon in possession of a firearm, in violation of Sections 922(g)(1) and 924(a)(2). 519 U.S. at 174; see *United States* v. *Old Chief*, 56 F.3d 75, 1995 WL 325745, at *4 (9th Cir. 1995) (Tbl.) (defendant received ten-year sentence, indicating prosecution under 18 U.S.C. 924(a)(2)). Because the defendant was willing to stipulate to his status as a felon, the Court held that the government should not have been allowed to introduce evidence about the nature of his prior conviction. *Old Chief*, 519 U.S. at 174-175. The Court concluded that, where a defendant offers to stipulate to his felon status, the "probative value" of evidence as to the nature of the conviction "is substantially outweighed by the danger of unfair prejudice," so as to require its exclusion under

Federal Rule of Evidence 403. 519 U.S. at 180 (citation omitted); see *id.* at 180-192.

In reaching that conclusion, the Court described a stipulation of the fact of a prior conviction as "seemingly conclusive evidence of the [prior-conviction] element" of the crime. *Old Chief*, 519 U.S. at 186; see *ibid.* ("[A]lthough the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission."). The Court observed that the "statutory language in which the prior-conviction requirement is couched shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies." *Ibid.*; see *id.* at 201 (O'Connor, J., dissenting) (similarly recognizing that the offense has "two elements," one of which is "a defendant's prior criminal conviction"). The Court thus described the requirement to prove a prior conviction—to establish the defendant's "legal status" as a person ineligible to possess a firearm—as "an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense." *Id.* at 190-191.

Accordingly, in applying Rule 403's balancing test, the Court in *Old Chief* viewed the probative value of prior-conviction evidence to be limited to proof of the defendant's "legal status," and not to any requirement of knowledge. 519 U.S. at 190. The Court acknowledged that the nature of the prior conviction was "relevant" to the verdict, because "it served to place [the defendant] within a particular subclass of offenders for whom firearms possession is outlawed by § 922(g)(1)." *Id.* at 179. But the Court emphasized that "if * * *

there were a justification for receiving evidence of the nature of prior acts on some issue other than status"—in particular, "to prove 'motive, opportunity, intent, preparation, plan, *knowledge*, identity, or absence of mistake or accident'"—then Federal Rule of Evidence 404(b) "guarantees the opportunity to seek its admission." *Id.* at 190 (quoting Fed. R. Evid. 404(b)) (emphasis added).

The absence of any requirement that the defendant know his legal status as a convicted felon was thus critical to the Court's holding in *Old Chief*. The Court made clear that a "prosecutor's choice" to present evidence directly, rather than by stipulation, "will generally survive a Rule 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his *thoughts and actions* in perpetrating the offense for which he is being tried." 519 U.S. at 192 (emphasis added). But the Court reasoned that in the context of a felon-in-possession prosecution, the "recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has * * * virtually no application," because "the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." *Id.* at 190.

The reasoning of *Old Chief* would not hold true, however, if the statutory scheme required the government to prove the defendant's *knowledge* of his prior conviction. If that were the case, the nature of the underlying offense (*e.g.*, its seriousness) and its prosecution (*e.g.*, details of the trial) would be quite probative of the defendant's memory of the prior crime and understand-

ing that he faced more than one year in prison for committing it. Thus, although *Old Chief* did not directly consider the question presented here, it would effectively be overruled if the Court were now to conclude—contrary to its understanding in that case—that knowledge of status is required under Sections 922(g) and 924(a)(2).

3. Congress enacted the "knowingly violates" requirement to codify the preexisting interpretation of the firearm laws in the courts of appeals, which did not require proof of knowledge of status

The history of the federal firearms statutes provides further support for the absence of a requirement to prove a defendant's knowledge of his legal status and personal circumstances in a prosecution under Section 924(a)(2). For well over half a century, the criminal penalties on possession of a firearm by a prohibited person have been understood to require proof of knowledge only of conduct. The current language of Section 924(a)(2) codifies, rather than overrides, that understanding.

a. Sections 922(g) and 924(a)(2) trace their roots to the Federal Firearms Act of 1938 (1938 Act), ch. 850, 52 Stat. 1250 (15 U.S.C. 901 *et seq.*). Like the current law, the 1938 Act prohibited certain categories of people from possessing firearms. See § 2(e) and (f), 52 Stat. 1251; see also § 1(1), 52 Stat. 1250. Also like the current law, those prohibitions did not contain a mens rea requirement, though other regulatory provisions did. See, *e.g.*, § 2(d), 52 Stat. 1251 (15 U.S.C. 902(d) (Supp. IV 1938)). The provision imposing criminal penalties on "[a]ny person violating any of the provisions of th[e] Act" did not include an express mens rea requirement. § 5, 52 Stat. 1252 (15 U.S.C. 905 (Supp. IV 1938)). Courts

of the era accordingly recognized that the possession offenses analogous to those at issue here did not require proof that the defendant knew his own status. See, *e.g.*, *Braswell* v. *United States*, 224 F.2d 706, 710 (10th Cir.), cert. denied, 350 U.S. 845 (1955). And they continued to do so after Congress expanded the original prohibitions to encompass felons, see Act of Oct. 3, 1961, Pub. L. No. 87-342, 75 Stat. 757. See, *e.g.*, *Landsdown* v. *United States*, 348 F.2d 405, 409-410 (5th Cir. 1965).

In 1968, Congress overhauled the firearms laws. See Omnibus Crime Control and Safe Streets Act of 1968 (Omnibus Act), Pub. L. No. 90-351, 82 Stat. 197; see also Gun Control Act of 1968 (Gun Control Act), Pub. L. No. 90-618, 82 Stat. 1213 (18 U.S.C. 921 *et seq.*). As before, certain classes of persons—now including aliens unlawfully in the United States—were prohibited from possessing, shipping, transporting, or receiving firearms or ammunition. Gun Control Act § 102, 82 Stat. 1220-1221; Omnibus Act, Tit. VII, § 1202(b), 82 Stat. 236. As before, those provisions contained no mens rea requirement, but many neighboring provisions did. See, *e.g.*, Gun Control Act § 102, 82 Stat. 1220; Omnibus Act, Tit. VII, § 1202(b), 82 Stat. 236-237. And as before, the criminal-penalty provision did not itself contain a mens rea requirement. Accordingly, nearly every court of appeals to consider the issue determined that no knowledge requirement attached to the relevant status elements. See, *e.g.*, *United States* v. *Oliver*, 683 F.2d 224, 229 (7th Cir. 1982); *United States* v. *Pruner*, 606 F.2d 871, 873-874 (9th Cir. 1979); *United States* v. *Williams*, 588 F.2d 92, 92-93 (4th Cir. 1978) (per curiam); *United States* v. *Goodie*, 524 F.2d 515, 518 (5th Cir. 1975), cert. denied, 425 U.S. 905 (1976); *United States* v. *Wiley*, 478 F.2d 415, 418 (8th Cir. 1973), cert. denied, 419 U.S. 879

(1974). But see *United States* v. *Renner*, 496 F.2d 922, 924, 927 (6th Cir. 1974) (requiring knowledge that the defendant was under indictment, out of concern about secret indictments).

b. In 1982, a Senate subcommittee concluded that reform of the firearms laws was necessary in order to ensure that enforcement efforts were focused on the "primary object of limiting access of felons and other high-risk groups to firearms," rather than on "technical *malum prohibitum* charges, of individuals who lack all criminal intent and knowledge," such as "collectors," who had become frequent law-enforcement targets. S. Rep. No. 476, 97th Cong., 2d Sess. 15 (1982) (citation omitted). In 1984, the Senate Judiciary Committee proposed the mens rea requirements that are currently codified in Section 924(a), including the "knowingly violates" requirement that now appears in Section 924(a)(2). S. 914, 98th Cong., 2d Sess. 41 (1984). The Committee explained that, after taking into account law-enforcement warnings against making prosecutions of serious offenders too difficult, it had "specifie[d] a 'knowing' state of mind with respect to offenses that involve the greatest moral turpitude and danger from a justified law enforcement standpoint," but had included a willfulness requirement for less-serious offenses, thereby limiting prosecutions for such offenses to "situations where the offender has actual cognizance of all facts necessary to constitute the offense, but not necessarily knowledge of the law." S. Rep. No. 583, 98th Cong., 2d Sess. 20 (1984).

The next Congress enacted the relevant Senate language in the Firearms Owners' Protection Act of 1986 (FOPA), Pub. L. No. 99-308, 100 Stat. 449. In a report discussing the Senate's proposal, the House of Representatives described its understanding that current

"[c]ase law interpreting the criminal provisions of the [Gun Control Act] ha[s] required that the government prove that the defendant's *conduct* was knowing, but not that the defendant knew that his conduct was in violation of the law." H.R. Rep. No. 495, 99th Cong., 2d Sess. 10 (1986) (emphasis added). The adoption of the language accordingly reflected Congress's codification of the dominant interpretation that courts had given to the precursor offenses that appeared in the 1938 and 1968 enactments, which did not require knowledge of status or personal circumstances.

c. In accord with that legislative design, every court of appeals to consider the issue after the FOPA's enactment has determined that the knowledge requirement in Section 924(a)(2) applies only to the defendant's conduct in violating Section 922(g), not his status. See *United States* v. *Smith*, 940 F.2d 710, 713 (1st Cir. 1991); *United States* v. *Huet*, 665 F.3d 588, 596 (3d Cir.), cert. denied, 568 U.S. 941 (2012); *United States* v. *Langley*, 62 F.3d 602, 604-608 (4th Cir. 1995) (en banc), cert. denied, 516 U.S. 1083 (1996); *United States* v. *Rose*, 587 F.3d 695, 705-706 & n.9 (5th Cir. 2009) (per curiam), cert. denied, 559 U.S. 1019 (2010); *United States* v. *Dancy*, 861 F.2d 77, 80-82 (5th Cir. 1988) (per curiam); *United States* v. *Lane*, 267 F.3d 715, 720 (7th Cir. 2001); *United States* v. *Thomas*, 615 F.3d 895, 899 (8th Cir. 2010); *United States* v. *Kind*, 194 F.3d 900, 907 (8th Cir. 1999), cert. denied, 528 U.S. 1180 (2000); *United States* v. *Miller*, 105 F.3d 552, 555 (9th Cir.), cert. denied, 522 U.S. 871 (1997), abrogated on other grounds by *Caron* v. *United States*, 524 U.S. 308 (1998); *United States* v. *Games-Perez*, 667 F.3d 1136, 1142 (10th Cir. 2012), cert. denied, 571 U.S. 830 (2013); *United States* v. *Capps*, 77 F.3d 350, 352-354 (10th Cir.), cert. denied, 518 U.S.

1027 (1996); *United States* v. *Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam); *United States* v. *Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008).

Congress has amended Sections 922 and 924 at least a dozen times during that period.* But it has never altered the "knowingly violates" language in Section 924(a)(2). Although legislative silence does not invariably signal acquiescence, if Congress thought that courts were consistently flouting a new mens rea requirement

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* See Pub. L. No. 115-391, § 403, 132 Stat. 5221 (Section 924); Pub. L. No. 114-94, § 11412(c)(2), 129 Stat. 1688 (Section 922); Pub. L. No. 109-304, § 17(d)(3), 120 Stat. 1707 (Section 924); Pub. L. No. 109-92, §§ 5(c), 6(a) and (b), 119 Stat. 2099-2102 (Sections 922 and 924); Pub. L. No. 107-296, § 1112(f)(4) and (6), 116 Stat. 2276 (Section 922); Pub. L. No. 107-273, §§ 4002(d)(1)(E), 4003(a)(1), 11009(e)(3), 116 Stat. 1809, 1811, 1821-1822 (Sections 922 and 924); Pub. L. No. 105-386, § 1(a), 112 Stat. 3469-3470 (Section 924); Pub. L. No. 105-277, §§ 101(a), 121, 112 Stat. 2681, 2681-71 (Section 922); Pub. L. No. 104-294, § 603(b)-(g) and (m)-(s), 110 Stat. 3503-3505 (Sections 922 and 924); Pub. L. No. 104-208, §§ 657, 658(b), 110 Stat. 3009-369 to 3009-372 (Section 922); Pub. L. No. 103-322, §§ 60013, 110102(a) and (c), 110103(a) and (c), 110106, 110201(a) and (b), 110401(b), (c), and (e), 110503, 110504(a), 110507, 110510-110511, 110514-110515(a), 110517-110518(a), 320904, 320927, 330002(h), 330003(f)(2), 330011(i) and (j), 330016(1)(H), (K), and (L), 108 Stat. 1973, 1996, 1996-2012, 2014-2016, 2018-2020, 2125-2126, 2131, 2140-2141, 2145, 2147 (Sections 922 and 924); Pub. L. No. 103-159, Tits. I, III, §§ 102(a)(1), (b), and (c), 302, 107 Stat. 1536-1537, 1539-1541, 1545 (Sections 922 and 924); Pub. L. No. 101-647, §§ 1101, 1702(b)(1) and (3), 2201-2202, 2203(d), 2204(b) and (c), 3524, 3526-3529, 104 Stat. 4829, 4844-4845, 4856-4857, 4924 (Sections 922 and 924); Pub. L. No. 100-690, §§ 6211-6212, 6451, 6460, 6462, 7056, 7060(a) and (c), 102 Stat. 4359-4360, 4371, 4373-4374, 4402-4404 (Sections 922 and 924); Pub. L. No. 100-649, § 2(a), (b), (f)(2)(A), (f)(2)(B), and (f)(2)(D), 102 Stat. 3816-3818 (Sections 922 and 924); Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39 to 3207-40 (Section 924); Pub. L. No. 99-408, § 2, 100 Stat. 920-921 (Section 922).

that it had intended to add through the FOPA, presumably it would have acted to correct that perceived error. See, *e.g.*, *Evans* v. *United States*, 504 U.S. 255, 269 (1992).

C. Congress Had Sound Reasons For Requiring Proof Of A Section 922(g) Defendant's Knowledge Only As To His Conduct, Not His Personal History Or Legal Status

The longstanding approach to firearm prosecutions, in which proof of knowledge is required only as to conduct, and not personal circumstances or status, makes good sense. A contrary approach would have little practical benefit, would be overly burdensome, and would make a defendant's past unsympathetic conduct, rather than his current offense conduct, the focus of the trial.

1. Defendants who actually lack knowledge of their relevant personal circumstances will be few and far between. Petitioner has provided no basis for concluding, for example, that many people "convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. 922(g)(1), are ignorant of that prior conviction. Nor are many people likely to be unaware of other personal circumstances that place them in the other categories enumerated in Section 922(g), such as being a fugitive from justice, a drug addict, a patient committed to a mental institution, someone who has renounced his citizenship, or a misdemeanant convicted of domestic violence. 18 U.S.C. 922(g)(2), (3), (4), (7), and (9). And the one qualifying circumstance that a person might be less likely to know about —the presence of a restraining order—specifically requires that the order was "issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate." 18 U.S.C. 922(g)(8)(A).

Someone's status as an alien "illegally or unlawfully in the United States," 18 U.S.C. 922(g)(5)(A), is something he presumably does, or at least should, know. As discussed above, see pp. 22-25, *supra*, the law frequently presumes that an alien is aware of his status. Petitioner, for example, applied for a nonimmigrant student visa, signed a form attesting that he understood the terms and conditions of his admission to the United States, underwent an interview at a United States consulate in order to obtain the visa, and received notification from his school regarding the termination of his immigration status. Pet. App. 2a-3a; D. Ct. Doc. 73-3, at 2; D. Ct. Doc. 73-4; D. Ct. Doc. 73-7; D. Ct. Doc. 73-8; 5/16/16 Tr. 187-188, 208, 237-238. If an alien were indeed to lack actual knowledge of his personal circumstances, it is most likely due to his own recklessness or negligence—in which case excusing his conduct would make little sense. And to the extent that an alien's lack of subjective awareness of his immigration status is due to legal complexities, such mistakes of law do not traditionally provide a basis for avoiding criminal liability. See, *e.g.*, *Utermehle* v. *Norment*, 197 U.S. 40, 55 (1905) ("It would be impossible to administer the law if ignorance of its provisions were a defense thereto.").

In addition, a person who purchases his firearms and ammunition from a federally licensed dealer will be put on notice of Section 922(g)'s requirements. Section 922 "establishes a detailed scheme to enable the dealer to verify, at the point of sale, whether a potential buyer may lawfully own a gun." *Abramski* v. *United States*, 573 U.S. 169, 172 (2014). As implemented by federal regulations, that scheme includes a form, part of which is "completed by the buyer," that "lists all the factors disqualifying a person from gun ownership, and asks

the would-be buyer whether any of them apply (*e.g.*, 'have you ever been convicted of a felony?')." *Id.* at 173 (brackets, citation, and ellipsis omitted). The applicant must certify any answers to those questions as "true, correct and complete," *id.* at 174 (citation omitted), and the dealer must "submit that information to the National Instant Background Check System (NICS) to determine whether the potential purchaser is for any reason disqualified from owning a firearm," *id.* at 172-173. Those requirements provide further notice of the law and opportunity to ensure compliance.

2. At the same time, direct evidence of a defendant's knowledge may be complicated to present at trial. In a typical criminal prosecution, knowledge or intent can be inferred from the circumstances of the defendant's offense conduct. See *United States* v. *Williams*, 553 U.S. 285, 306 (2008). Proof that a defendant, say, surreptitiously took a television that did not belong to him will, in itself, tend to prove an intent to steal. Cf. *Regalado Cuellar* v. *United States*, 553 U.S. 550, 567-568 n.8 (2008) ("[W]here the consequences of an action are commonly known, a trier of fact will often infer that the person taking the action knew what the consequences would be and acted with the purpose of bringing them about."). That is not the case, however, with respect to proof of a defendant's knowledge of his personal circumstances or legal status.

Those attributes of a defendant are temporally unrelated to his instant offense conduct of shipping, transporting, possessing, or receiving a firearm. See 18 U.S.C. 922(g). Proving them thus requires opening a window into the past, which may not be straightforward to do. In prosecuting someone with a prior felony conviction

who received a sentence of less than a year of imprisonment for his prior offense, for example, the government might face difficulties in proving that he nevertheless knew and later remembered that he *could have been* punished more severely. In the federal system, a defendant who pleads guilty must be informed of the "maximum possible penalty," Fed. R. Crim. P. 11(b)(1)(H), but no similar requirement applies to defendants who face trial. Even where notice of the maximum penalty was given during the prior proceedings, identifying proof of that fact will often be difficult. Transcripts for old convictions, or for convictions obtained in state courts, may be unavailable. And a defendant can always deny that he heard or "understood," Pet. Br. 4, or later forgot, what was said in court about the maximum possible penalty.

To the extent that those facts would be easy to prove, it would primarily be because they are self-evident. A jury, which can bring into deliberations its "own general knowledge," *Head* v. *Hargrave*, 105 U.S. 45, 49 (1881), and its "commonsense understanding," *Parker* v. *Matthews*, 567 U.S. 37, 44 (2012) (per curiam), is likely to recognize that someone convicted of a felony almost assuredly knew about it. But the self-evidentiary nature of the inquiry is precisely why Congress would *not* have wanted to require such proof in every prosecution.

3. If the government *were* required to prove a defendant's knowledge of his status as a felon, or as falling within any of the other categories enumerated in Section 922(g), it would fundamentally alter the nature of the trial. A substantial portion of the trial, perhaps the majority of it, would be consumed by evidence of the defendant's actions on a previous occasion. And that evidence—about, say, the defendant's prior crime, mental hospitalization, or unlawful presence in the United

States—would not only be time-consuming and distracting, but also potentially prejudicial to the defendant.

The Court recognized as much in *Old Chief*. The Court there found "no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant" in a felon-in-possession prosecution. 519 U.S. at 185. Although the risk would "vary from case to case," it would "be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning." *Ibid.* And "[w]here a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious." *Ibid.*

Had Congress in fact required proof of knowledge of the defendant's legal status or personal history, such evidence would be a necessary component of the trial. Although somewhat distracting and prejudicial, it would be highly probative, part of the government's "continuous story" of the offense. *Old Chief*, 519 U.S. at 190. Under those circumstances, Rule 404(b) would "guarantee[] the opportunity to seek its admission," and it would thus not be excludable under Rule 403, even if the defendant wanted to stipulate to it. *Ibid.*; see *id.* at 190-192. Particularly given the exceedingly low likelihood that the defendant actually lacked knowledge of his own status (or at least of the facts underlying it), and the difficulties of presenting evidence of such knowledge, Congress sensibly concluded that requiring proof of such knowledge would be unwarranted.

D. Petitioner's Arguments Lack Merit

Petitioner nevertheless contends (Br. 11) that the government was required to prove that he had knowledge of his "particular status" under immigration law, which he describes as a "complex" legal question. In making that argument, petitioner does not address the statutory structure under which background circumstances in Section 922(g) have their own mens rea requirements, this Court's decision in *Old Chief*, or the interpretive rules and practical considerations that counsel against requiring proof of a defendant's knowledge of his legal status and personal history. Indeed, he does not contend that self-knowledge of his personal history —*e.g.*, that he was an alien, that he had been admitted on a student visa, and that he had been expelled from Florida Tech months earlier—was required, independent of any requirement to prove knowledge of the legal status that the personal history entailed. He instead advances an interpretation of the statute that erroneously treats Section 922(g) as if that provision *itself* contained the word "knowingly." It does not, and petitioner's proposed reading is unsustainable.

1. Petitioner's argument centers around the assertion (Br. 9) that because Section 924(a)(2) imposes punishment on "'[w]hoever knowingly violates'" Section 922(g), it thereby "attach[es]" a knowledge requirement "to each element of [the] crime" listed in Section 922(g). But even petitioner does not believe that to literally be true, as he acknowledges (Br. 30-32) that no mens rea requirement applies to the jurisdictional element. For reasons explained above, the same is true of the status element.

Petitioner's argument also fails as a matter of plain language. In imposing punishment on a defendant who

"knowingly violates" Section 922(g), Section 924(a)(2) is naturally understood to require proof that the defendant knew of the *conduct* that violated Section 922(g)—*i.e.*, knew of the "ship[ing]," "transport[ing]," "possess-[ing]," or "receiv[ing]" of a firearm or ammunition. But Section 924(a)(2) does not create a new mental-state requirement for the defendant's legal status, or for other circumstance-based elements in Section 922(g) that otherwise would have none. For instance, consider a prohibition against "driving under the influence of alcohol causing the death of a pedestrian," whose applicability does not turn on mens rea for the element of injury. If a separate provision specifies a particular penalty for anyone who "knowingly violates" that law, then under the most straightforward construction of the penalty provision, the defendant would face that punishment so long as he knew that he drove under the influence of alcohol, even if he believed he struck a deer rather than a pedestrian.

Nor would it be sensible to read Section 922(g), as petitioner does, as if the word "knowingly" appeared before each subsection of that provision. The various statuses listed in Section 922(g) are introduced by phrases with different verb tenses, several of which cannot be paired comfortably with an adverb. For instance, subsection (g)(1) applies to a defendant "who *has been convicted*" of a felony, and subsection (g)(7) applies to a defendant "who, *having been a citizen of the United States*, has renounced his citizenship." 18 U.S.C. 922(g)(1) and (7) (emphasis added). It is unclear, as a matter of plain language, how a speaker would follow petitioner's instruction (Br. 9) to "attach" the word "'knowingly'" to each of those clauses.

Because Section 922(g) does not itself specify any mens rea, petitioner also cannot rely (Br. 14-17) on decisions interpreting criminal statutes "that introduce[] the elements of a crime with the word 'knowingly.'" *Flores-Figueroa* v. *United States*, 556 U.S. 646, 652 (2009) (citation omitted); see *id.* at 652-653 (discussing *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994), and *Liparota* v. *United States*, 471 U.S. 419 (1985)). Such decisions reflect the principle that "where a transitive verb has an object," it may be proper to "assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." *Flores-Figueroa*, 556 U.S. at 650. That linguistic principle has no application here, however, where the term "knowingly" does not "introduce[] the elements of [the] crime" of illegal firearm possession. *Id.* at 652. Instead, the term "knowingly" modifies "violates," which in turn incorporates various regulatory prohibitions, several of which contain their *own* mens rea requirements as to background circumstances. See pp. 21-22, *supra*. And for similar reasons, petitioner cannot rely (Br. 12-13) on the placement of the status element as "first" in the list of elements in Section 922(g)(5)(A); the word "knowingly" neither introduces nor otherwise directly modifies that list.

In addition, petitioner's argument disregards that Section 924(a)(2) is not the only provision that specifies criminal penalties for a violation of Section 922(g). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), prescribes a minimum sentence of 15 years of imprisonment and a maximum sentence of life for "a person who violates section 922(g)" and also has three prior convictions for a "violent felony" or "serious drug

offense." The ACCA provides a sentencing enhancement for certain recidivists who commit the same crime that is defined in Section 924(a)(2), see, *e.g.*, *Welch* v. *United States*, 136 S. Ct. 1257, 1261 (2016). But unlike Section 924(a)(2), the ACCA's reference to a defendant who "violates" Section 922(g) contains *no* express mens rea requirement. That is unremarkable so long as Section 924(a)(2)'s "knowingly" requirement is understood simply to codify the preexisting and long-held judicial understanding that knowledge of the act is sufficient in this context "to separate wrongful conduct from otherwise innocent conduct," *Elonis*, 135 S. Ct. at 2010 (citations and internal quotation marks omitted). But if Congress had in fact intended a sea change when it added the word "knowingly" to Section 924(a)(2), it would presumably have added it to Section 924(e)(1) as well.

2. Petitioner's efforts (Br. 21-22) to find support for his reading of the statute in the legislative history are misplaced. As the opening section of the FOPA explains, Congress sought to ensure that the law did not "place any undue or unnecessary Federal restrictions or burdens on *law-abiding citizens*." FOPA § 1(b)(2), 100 Stat. 449 (emphasis added; citation omitted). That goal is consistent with the "considerable" testimony Congress heard about "the pressing need" to revise preexisting law "to achieve a more appropriate balance between the constitutional rights of law-abiding gun owners and dealers, on the one hand, and legitimate law enforcement interests, on the other." 1984 Senate Report 3. Congress struck that balance by adding a willfulness requirement to protect law-abiding citizens against technical infractions, while "specif[ying] a 'knowing' state of mind with respect to offenses that involve the greatest

moral turpitude and danger from a justified law enforcement standpoint"—including for illegal-possession offenses under Section 922(g). *Id.* at 20. In doing so, it intended to preserve, not expand, the mens rea requirement under existing law, which required proof of knowledge only as to the defendant's conduct. See pp. 29-34, *supra*.

The floor statements by Senator Hatch, on which petitioner relies (Br. 10, 21), do not show otherwise. As an initial matter, "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017). In any event, petitioner misconstrues Senator Hatch's comments. As petitioner notes, Senator Hatch observed that "[t]he lack of any criminal state of mind requirements" had "resulted in severe penalties for unintentional missteps." 132 Cong. Rec. 9590 (May 6, 1986); see 131 Cong. Rec. 16,984 (June 24, 1985). But he clarified that his concern was that federal officials had "become mired down in enforcing technical infractions," in part because previous law had "failed to strike an appropriate balance between the constitutional rights of law-abiding gun owners and law enforcement interests." 131 Cong. Rec. 16,984. As previously explained, see pp. 31-32, *supra*, Congress addressed that concern by adding a special willfulness requirement for technical infractions—not by making it harder to prosecute potentially dangerous people who possess firearms.

3. Contrary to petitioner's contention (Br. 25-28), no background principle of statutory interpretation favors his reading of the statute. Petitioner first proposes (Br. 25) that his reading is required by "the constitutional-avoidance canon," on the theory that the uniform application of the firearm laws for the past 80 years raises

"significant Due Process issues." But he offers no support for that suggested constitutional theory, and none exists. This Court has long held that even "strict-liability offenses"—for which *no* mental-state requirement attaches to *any* element—"do not invariably offend constitutional requirements." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978) (plurality opinion); see *id.* at 437-438 (collecting cases upholding strict-liability offenses). And petitioner's due-process theory (which he does not squarely raise) could imply the constitutional invalidity of many prior convictions that require proof of knowledge only as to possession, including convictions that this Court has upheld. See, *e.g.*, *United States* v. *Freed*, 401 U.S. 601, 607 (1971) (upholding conviction for possession of unregistered hand grenades, despite defendant's argument that the government failed to prove his knowledge that the grenades were unregistered, because "the only knowledge required to be proved was knowledge that the instrument possessed was a firearm").

Petitioner next points to this Court's decision in *Staples* v. *United States*, *supra*, to argue that the "long tradition of widespread lawful gun ownership by private individuals in this country" requires proof that he knew about the immigration status that rendered his particular firearm possession unlawful. Pet. Br. 26 (quoting *Staples*, 511 U.S. at 610). In *Staples*, the Court interpreted the provisions that criminalize the possession of unregistered machineguns, 26 U.S.C. 5845(a)(6) and (b), 5861(d), as requiring the government to prove that the defendant "knew of the features of his [machinegun] that brought it within the scope of" the prohibition. 511 U.S. at 619. The Court noted that some items, even

if potentially dangerous, are "so commonplace and generally available that we would not consider them to alert individuals to the likelihood of [their] strict regulation." *Id.* at 611. Here, however, the asserted knowledge requirement does not concern any technical aspect of a firearm that a law-abiding citizen would otherwise be entitled to own, but instead concerns a personal characteristic *of the defendant himself*. As previously explained, see pp. 22-26, *supra*, the law can and does expect someone to know whether he is a convicted felon or an alien illegally or unlawfully in the United States. Such a person is not akin to the millions of law-abiding Americans who acquire firearms through "simple transaction[s] that would not alert a person to regulation any more than would buying a car." *Staples*, 511 U.S. at 614.

Finally, petitioner asserts (Br. 28) that if the Court finds "any ambiguity" regarding the statute's meaning, his proposed reading must be adopted under the "rule of lenity." But that rule applies only when a criminal statute contains a "*grievous* ambiguity or uncertainty." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (emphasis added; citations omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of that rule," *Muscarello*, 524 U.S. at 138; see *Abramski*, 573 U.S. at 188 n.10 ("The dissent would apply the rule of lenity here because the statute's text, taken alone, permits a narrower construction, but we have repeatedly emphasized that is not the appropriate test."). Instead, the rule applies "only if, after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello*, 524

U.S. at 138 (citations and internal quotation marks omitted); see *United States* v. *Castleman*, 572 U.S. 157, 173 (2014) (rule applies only where "the Court must simply guess as to what Congress intended") (citation omitted). For the reasons stated above—in light of the statutory text, context, judicial interpretation, and history of enactment—the Court need not "guess as to what Congress intended" here.

II. THE JUDGMENT BELOW CAN BE AFFIRMED ON THE ALTERNATE GROUND THAT ANY ERROR WAS HARMLESS

Even if the Court were to agree with petitioner that a prosecution under Sections 922(g) and 924(a)(2) requires knowledge of status, it should nevertheless affirm the judgment below, because any error in this case was harmless beyond a reasonable doubt. See *Neder* v. *United States*, 527 U.S. 1, 8-13 (1999) (jury instruction omitting an element of the offense may be harmless).

A. Petitioner does not dispute the jury's finding that, in December 2015, he was unlawfully in the country and knowingly possessed a Glock firearm at a shooting range and ammunition he had purchased at the range. See Indictment 1-2. And based on the trial evidence, any jury—if instructed of the need to do so—would have found that petitioner knew that he, "being an alien," was "illegally or unlawfully in the United States." 18 U.S.C. 922(g)(5)(A).

The record shows that petitioner is a citizen of the United Arab Emirates who came to the United States in 2013 on an F-1 nonimmigrant student visa. D. Ct. Doc. 73-5; D. Ct. Doc. 73-6; 5/16/16 Tr. 214. Before he entered the country, petitioner agreed and acknowledged by his signature that he was required to remain "enrolled as a full-time student" in order to maintain his

"nonimmigrant student status" and that he would be subject to deportation if he lost that status. D. Ct. Doc. 73-3, at 2; see D. Ct. Doc. 73-4. After petitioner's academic dismissal from Florida Tech, the school sent him emails explaining that his "immigration status w[ould] be terminated" in February 2015 unless he transferred to a new school or left the United States. D. Ct. Doc. 73-7; D. Ct. Doc. 73-8; see 5/16/16 Tr. 218. When questioned by federal investigators, petitioner initially lied about his student status, falsely claiming that he had enrolled at a different university after leaving Florida Tech. 5/17/16 Tr. 99. Following further questioning, however, petitioner admitted that he was no longer attending any school and "was aware that * * * he was out of status for his immigration." *Id.* at 101; see *id.* at 99. A reasonable jury, on that evidence, would find that petitioner knew he was in the United States without legal permission.

B. Petitioner does not directly contend otherwise. He instead focuses (Br. 7-8) on an evidentiary ruling by the district court excluding his driving record. But even if admissible, his driving record would not have created reasonable doubt that petitioner, who admitted knowledge of his immigration status to federal agents, was in fact ignorant of that status.

At trial, petitioner sought to introduce a copy of his Florida driving record as purported evidence that he lacked knowledge of his immigration status. Florida issued petitioner a driver's license on January 27, 2015, but suspended that license indefinitely in August 2015 after petitioner failed to pay a traffic fine. D. Ct. Doc. 74-1, at 4. Petitioner's theory appears to have been that because he had been "stopped by law enforcement" in August 2015, yet "no warrant was issued for his arrest

for immigration purposes or otherwise," he did not know that he was illegally or unlawfully in the United States. 5/17/16 Tr. 128; see *id.* at 119, 125-126. The district court declined to admit petitioner's driving record, stating that "I think that it would be confusing, and I don't think it rebuts any testimony." *Id.* at 129. The court also found that the document was "not relevant," but then observed that "[i]f it were a specific intent crime requiring him to know * * * his immigration status, then the ruling would be otherwise." *Id.* at 130.

Even assuming the district court would in fact have admitted petitioner's Florida driving record if it agreed with petitioner's statutory argument—despite the court's statement that petitioner's attempted showing was "confusing" and did not "rebut[] any testimony," 5/17/16 Tr. 129—that would not have changed the trial's outcome. Evidence that Florida had suspended petitioner's driver's license in August 2015, but that no warrant was issued for his arrest on immigration charges, does not in any way rebut petitioner's admission to federal investigators in December 2015 that he knew he was "out of status for his immigration." *Id.* at 101. Nor does it explain why petitioner felt the need to lie to investigators about having enrolled in a different school after failing out of Florida Tech. Even if the Court agrees with petitioner on the question presented, petitioner's conviction should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 922 (2012 & Supp. III 2015) provides:

Unlawful acts

(a) It shall be unlawful—

(1) for any person—

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that—

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from

mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such

person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or

rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, unless—

(A) the manufacture of such ammunition is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) the manufacture of such ammunition is for the purpose of exportation; or

(C) the manufacture or importation of such ammunition is for the purpose of testing or experimentation and has been authorized by the Attorney General;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, unless such sale or delivery—

(A) is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) is for the purpose of exportation; or

(C) is for the purpose of testing or experimentation and has been authorized by the Attorney General;[1]

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows

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[1] So in original. Probably should be followed with "and".

or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this

chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Attorney General.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—

(1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the prin-

cipal law enforcement officer of the locality to which the firearm will be delivered are _____

_____

Signature _____ Date _____."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Attorney General, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any

person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) has been adjudicated as a mental defective or has been committed to any mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who[2] has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such inti-

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[2] So in original. The word "who" probably should not appear.

mate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or

licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter. No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment—

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(*l*) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(*o*)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm—

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection—

(A) the term "firearm" does not include the frame or receiver of any such weapon;

(B) the term "major component" means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term "Security Exemplar" means an object, to be fabricated at the direction of the Attorney General, that is—

(i) constructed of, during the 12-month period beginning on the date of the enactment of this subsection, 3.7 ounces of material type 17-4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors:

Provided, however, That at the close of such 12-month period, and at appropriate times thereafter the Attorney General shall promulgate regulations

to permit the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of firearms previously prohibited under this subparagraph that are as detectable as a "Security Exemplar" which contains 3.7 ounces of material type 17-4 PH stainless steel, in a shape resembling a handgun, or such lesser amount as is detectable in view of advances in state-of-the-art developments in weapons detection technology.

(3) Under such rules and regulations as the Attorney General shall prescribe, this subsection shall not apply to the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm by a licensed manufacturer or any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm to determine whether paragraph (1) applies to such firearm. The Attorney General shall ensure that rules and regulations adopted pursuant to this paragraph do not impair the manufacture of prototype firearms or the development of new technology.

(4) The Attorney General shall permit the conditional importation of a firearm by a licensed importer or licensed manufacturer, for examination and testing to determine whether or not the unconditional importation of such firearm would violate this subsection.

(5) This subsection shall not apply to any firearm which—

(A) has been certified by the Secretary of Defense or the Director of Central Intelligence, after consultation with the Attorney General and the Ad-

ministrator of the Federal Aviation Administration, as necessary for military or intelligence applications; and

(B) is manufactured for and sold exclusively to military or intelligence agencies of the United States.

(6) This subsection shall not apply with respect to any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment of the Undetectable Firearms Act of 1988.

(q)(1) The Congress finds and declares that—

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary[3] the House of Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear

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[3] So in original. Probably should be followed by "of".

to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves—even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm—

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is—

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge

or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm—

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

(r) It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation under section 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable to sporting purposes except that this subsection shall not apply to—

(1) the assembly of any such rifle or shotgun for sale or distribution by a licensed manufacturer to the United States or any department or agency thereof

or to any State or any department, agency, or political subdivision thereof; or

(2) the assembly of any such rifle or shotgun for the purposes of testing or experimentation authorized by the Attorney General.

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under section 923, unless—

(A) after the most recent proposal of such transfer by the transferee—

(i) the transferor has—

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

(II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that—

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Attorney General has certified that compliance with subparagraph (A)(i)(III) is impracticable because—

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only—

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)[4]) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee—

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year, and has not been convicted in any court of a misdemeanor crime of domestic violence;

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[4] See References in Text note below.

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who—

(I) is illegally or unlawfully in the United States; or

(II) subject to subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to

the transfer that the transferor has about the transfer and the transferee to—

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law—

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages—

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term "chief law enforcement officer" means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

(9) The Attorney General shall take necessary actions to ensure that the provisions of this subsection are

published and disseminated to licensed dealers, law enforcement officials, and the public.

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless—

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B)(i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall—

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if—

(A)(i) such other person has presented to the licensee a permit that—

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Attorney General has certified that compliance with paragraph (1)(A) is impracticable because—

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Attorney General may, after notice and opportunity for a hearing, suspend for not more than 6 months or re-

voke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages—

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

[(v), (w) Repealed. Pub. L. 103-322, title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000.]

(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile—

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(2) It shall be unlawful for any person who is a juvenile to knowingly possess—

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(3) This subsection does not apply to—

(A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile—

(i) in the course of employment, in the course of ranching or farming related to activities at the residence of the juvenile (or on property used for ranching or farming at which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun;

(ii) with the prior written consent of the juvenile's parent or guardian who is not prohibited by Federal, State, or local law from possessing a firearm, except—

(I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at

which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or

(II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm;

(iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and

(iv) in accordance with State and local law;

(B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who possesses or is armed with a handgun in the line of duty;

(C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or

(D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in

which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term "juvenile" means a person who is less than 18 years of age.

(6)(A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings.

(B) The court may use the contempt power to enforce subparagraph (A).

(C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

(y) PROVISIONS RELATING TO ALIENS ADMITTED UNDER NONIMMIGRANT VISAS.—

(1) DEFINITIONS.—In this subsection—

(A) the term "alien" has the same meaning as in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)); and

(B) the term "nonimmigrant visa" has the same meaning as in section 101(a)(26) of the Im-

migration and Nationality Act (8 U.S.C. 1101(a)(26)).

(2) EXCEPTIONS.—Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is—

(A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;

(B) an official representative of a foreign government who is—

(i) accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; or

(ii) en route to or from another country to which that alien is accredited;

(C) an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or

(D) a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

(3) WAIVER.—

(A) CONDITIONS FOR WAIVER.—Any individual who has been admitted to the United States under a nonimmigrant visa may receive a waiver from the requirements of subsection (g)(5), if—

(i) the individual submits to the Attorney General a petition that meets the requirements of subparagraph (C); and

(ii) the Attorney General approves the petition.

(B) PETITION.—Each petition under subparagraph (B) shall—

(i) demonstrate that the petitioner has resided in the United States for a continuous period of not less than 180 days before the date on which the petition is submitted under this paragraph; and

(ii) include a written statement from the embassy or consulate of the petitioner, authorizing the petitioner to acquire a firearm or ammunition and certifying that the alien would not, absent the application of subsection (g)(5)(B), otherwise be prohibited from such acquisition under subsection (g).

(C) APPROVAL OF PETITION.—The Attorney General shall approve a petition submitted in accordance with this paragraph, if the Attorney General determines that waiving the requirements of subsection (g)(5)(B) with respect to the petitioner—

(i) would be in the interests of justice; and

(ii) would not jeopardize the public safety.

(z) SECURE GUN STORAGE OR SAFETY DEVICE.—

(1) IN GENERAL.—Except as provided under paragraph (2), it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun.

(2) EXCEPTIONS.—Paragraph (1) shall not apply to—

(A)(i) the manufacture for, transfer to, or possession by, the United States, a department or agency of the United States, a State, or a department, agency, or political subdivision of a State, of a handgun; or

(ii) the transfer to, or possession by, a law enforcement officer employed by an entity referred to in clause (i) of a handgun for law enforcement purposes (whether on or off duty); or

(B) the transfer to, or possession by, a rail police officer directly employed by or contracted by a rail carrier and certified or commissioned as a police officer under the laws of a State of a handgun for purposes of law enforcement (whether on or off duty);

(C) the transfer to any person of a handgun listed as a curio or relic by the Secretary pursuant to section 921(a)(13); or

(D) the transfer to any person of a handgun for which a secure gun storage or safety device is temporarily unavailable for the reasons described in the exceptions stated in section 923(e), if the licensed manufacturer, licensed importer, or licensed dealer delivers to the transferee within 10 calendar days from the date of the delivery of the handgun to the transferee a secure gun storage or safety device for the handgun.

(3) LIABILITY FOR USE.—

(A) IN GENERAL.—Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.

(B) PROSPECTIVE ACTIONS.—A qualified civil liability action may not be brought in any Federal or State court.

(C) DEFINED TERM.—As used in this paragraph, the term "qualified civil liability action"—

(i) means a civil action brought by any person against a person described in subparagraph (A) for damages resulting from the criminal or unlawful misuse of the handgun by a third party, if—

(I) the handgun was accessed by another person who did not have the permission or authorization of the person having

lawful possession and control of the handgun to have access to it; and

(II) at the time access was gained by the person not so authorized, the handgun had been made inoperable by use of a secure gun storage or safety device; and

(ii) shall not include an action brought against the person having lawful possession and control of the handgun for negligent entrustment or negligence per se.

2. 18 U.S.C. 924 (2012) provides:

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under

the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided

for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chap-

ter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is dem-

onstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of

such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(*l*) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(*o*) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is

equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

(1) IN GENERAL.—

(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) REVIEW.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) ADMINISTRATIVE REMEDIES.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

No. 17-9560

IN THE

Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

INTRODUCTION

The government spends much of its brief ignoring 18 U.S.C. § 924(a)(2)'s text. In the little time it spends on the text, the government fails to overcome the reality that 18 U.S.C. § 922(g) sets forth two substantive elements—status and possession. Based on the plain text, statutory scheme, and this Court's precedent, § 924(a)(2) is best read as requiring a knowing *mens rea* for both of those elements.

The government claims Mr. Rehaif's reading creates a "textual muddle" of § 922's neighboring provisions. Mr. Rehaif's reading, however, is consistent with Congress's scheme.

The government additionally contends that Mr. Rehaif's position would allow defendants to claim ignorance of the law. But "knowingly violates" means knowledge of the facts, not the law. Consistent with *Liparota v. United States*, 471 U.S. 419 (1985), and *McFadden v. United States*, 135 S. Ct. 2298 (2015), there is no impediment to applying a knowing *mens rea* to a factual element containing a legal component, such as § 922(g)'s status element.

The government raises several other misplaced concerns. First, the government argues Congress's "typical practice" is to relieve the government of its burden to prove a defendant knew his status. But what the government calls "typical practice" is simply a newly invented theory that runs contrary to the presumption that a *mens rea* applies to all substantive elements criminalizing otherwise innocent conduct.

The government also suggests Mr. Rehaif's interpretation conflicts with *Old Chief v. United*

States, 519 U.S. 172 (1997). *Old Chief*, however, is a Federal Rule of Evidence 403 decision, and it did not purport to interpret § 924(a)(2)'s "knowingly violates" requirement. Further, *Old Chief*'s unfair-prejudice analysis regarding a defendant's offer to stipulate to his status applies equally to a defendant's offer to stipulate to his knowledge of his status.

The government's concerns about the practical difficulties of proving knowledge and Congress's alleged policy goals are overstated and do not defeat the plain text of the statutes. Finally, the government wrongly argues harmless error applies.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTES DEMONSTRATES THAT § 924(a)(2)'S "KNOWINGLY VIOLATES" PROVISION APPLIES TO BOTH OF § 922(g)'S SUBSTANTIVE ELEMENTS.

Section 924(a)(2) plainly applies a knowing *mens rea* to both of § 922(g)'s substantive elements. Moreover, applying a knowing *mens rea* to those elements adheres to the overarching presumption that a *mens rea* applies to all substantive elements criminalizing otherwise innocent conduct. The government suggests "knowingly violates" applies to only § 922(g)'s possession element, but nothing in the text limits the knowledge requirement. The government also argues Mr. Rehaif's reading would render other terms in § 922 provisions superfluous, but the government misconstrues Congress's statutory scheme. Finally, the government argues there is a "general principle" that Congress "typically" relieves the government of the burden of proving a defendant knew his status, but no such "general principle" or "typical practice" exists.

A. Section 924(a)(2) Criminalizes Knowing Violations of § 922(g).

The government reads § 924(a)(2)'s "knowingly violates" requirement as applying to only § 922(g)'s possession element, which it calls § 922(g)'s prohibited "conduct." Brief for the United States 13, 18, *Rehaif v. United States*, No. 17-9560 (Mar. 25, 2019) ("GB"). That truncated reading is inconsistent with the plain text of the statutes.

Section 924(a)(2) provides that "[w]hoever knowingly violates subsection . . . (g) . . . of section 922" shall be punished by up to 10 years' imprisonment. Section 922(g), in turn, prohibits (1) certain categories of persons from (2) possessing a firearm or ammunition. The plain text of the statutes leaves no room for the government's contention that "knowingly violates" refers to only § 922(g)'s possession element.

As a matter of ordinary English, the adverb "knowingly" modifies the verb "violates" and its direct object "subsection . . . (g) . . . of section 922." Nothing in § 924(a)(2)'s text limits "knowingly violates" to only the second-listed element in § 922(g). Indeed, in *Flores-Figueroa v. United States*, this Court stated "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." 556 U.S. 646, 652 (2009). Thus, a person "knowingly violates subsection . . . (g)" by knowing both his status and gun possession.

Jurisdictional elements, however, are unique in that they concern only Congress's power to legislate, not a defendant's culpability. This Court, therefore, has recognized knowledge of jurisdictional facts is ordinarily not required. *Torres v. Lynch*, 136 S. Ct. 1619, 1630-31 (2016); *United States v. Yermian*, 468

U.S. 63, 68 (1984); *United States v. Feola*, 420 U.S. 671, 676-77 & n.9 (1975).[1] But the Court has never recognized a similar exception for substantive elements, such as § 922(g)'s status element. The treatment of jurisdictional elements therefore does not undermine that § 924(a)(2)'s *mens rea* requirement applies to § 922(g)'s first-listed element, status, which is not a jurisdictional element.

The government's reading requires rewriting § 924(a)(2) to say, for instance, "knowingly violates the conduct prohibited" in § 922(g), or taking "knowingly" out of § 924(a)(2) and inserting it in § 922(g) after its list of prohibited possessors. But Congress did neither.

The government nonetheless asserts that "knowingly violates" applies to only § 922(g)'s possession element, reasoning that § 922(g) is a "regulatory provision" designed to keep firearms away from certain individuals—i.e., "regulated person[s]." GB 15-16. By labeling § 922(g) a "regulatory provision . . . without attaching any punishment," the government suggests § 922(g) may be read separately from § 924(a)(2). GB 15-16. But even the government does not believe that. GB 21 (acknowledging the offense here is "defined by Sections 922(g) and 924(a)(2)"). Indeed, "Congress does not create criminal offenses having no sentencing component." *Ball v. United States*, 470 U.S. 856, 861 (1985).

Moreover, labeling § 922(g) a "regulatory provision" does not change § 924(a)(2)'s text. "It is hardly crazy to

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[1] Congress was presumably aware of this longstanding precedent when it enacted the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (FOPA). *See United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents.").

think that in a § 922(g)(1) prosecution Congress might require the government to prove that the defendant had knowledge of the *only fact* (his felony status) separating criminal behavior from not just permissible, but constitutionally protected, conduct." *United States v. Games-Perez*, 667 F.3d 1136, 1145 (10th Cir. 2012) (Gorsuch, J., concurring).[2]

B. Mr. Rehaif's Reading is Consistent with the Statutory Scheme.

The government rightly does not claim Mr. Rehaif's reading of "knowingly violates" renders any term in § 922(g) superfluous. Instead, it contends Mr. Rehaif's reading, if applied to the other § 922 provisions referenced in § 924(a)(2), would create surplusage and a "textual muddle." GB 21-22. The government misconstrues the statutory scheme. Moreover, its proposed reading creates the "textual muddle" of which it complains.

1. Congress inserted "knowingly" into § 924(a) "to add a scienter requirement as a condition to the imposition of penalties" for § 922. *Bryan v. United States*, 524 U.S. 184, 188 (1998). Congress thereby created a default rule—where a substantive element of a violation listed in § 924(a)(2) is silent on *mens rea*, § 924 supplies it. Section 922(g) contains no express *mens rea*. Thus, by congressional design, "knowingly violates" ensures a knowing *mens rea* applies to § 922(g)'s substantive elements, status and possession.

But where Congress provided a specific *mens rea* in § 922's text, it demonstrated its intent to depart from

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[2] Nowhere in its brief does the government acknowledge then-Judge Gorsuch's opinions in *Games-Perez*.

§ 924(a)(2)'s default rule. *See Russello v. United States*, 464 U.S. 16, 23 (1983). For example, Congress provided a specific and different *mens rea*, namely "knowing or having reasonable cause to believe," for offenses involving the sale of firearms to prohibited persons in § 922(d) and the sale or transportation of stolen firearms in §§ 922(i) and (j). Congress's decision to apply a specific *mens rea* in §§ 922(d), (i), and (j) reflects its choice to depart from § 924(a)(2)'s default rule and apply a broader *mens rea* to prove a person's knowledge about another's prohibited status or a firearm having been stolen. *See Hinck v. United States*, 550 U.S. 501, 506 (2007) (discussing the general/specific canon). Thus, Mr. Rehaif's reading gives full effect to the text of the statutes. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (noting "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute" (citation omitted)).[3]

The only "textual muddle" is created by the government's proposed reading. For instance, the government contends "'knowingly violates' must refer to the act" prohibited in § 922. GB 22. But § 922(a)(6), to which § 924(a)(2) applies, makes it unlawful "knowingly to make any false or fictitious oral or written statement . . . ." Under the government's reading, "knowingly violates" applies to the conduct element in § 922(a)(6), thus creating the very redundancy of which it complains. *See Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 106 (2011) ("But the

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[3] Section 922(h), which uses "who to that individual's knowledge and while being employed," includes that language to introduce requirements beyond those in § 924(a)(2). In other words, Congress made it clear that a person must know that he is employed and that he is employed by a person covered under (g).

canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute.") (internal quotation marks and citations omitted).

2. The government also argues that applying different *mens rea* requirements to § 922(g)'s neighboring provisions would produce anomalies. GB 22. For example, the government speculates Congress could not have intended a firearms seller to be convicted if the seller has reasonable cause to know a purchaser is an illegal alien, while an illegal alien could be convicted only if he has actual knowledge of his immigration status. GB 22 (citing § 922(d)). But the government fails to explain why Congress's decision to place a higher burden on those in the firearms business is an anomaly. The government's speculation aside, Congress's decision to lower the *mens rea* to prosecute sellers makes sense given the practical difficulties in proving one's knowledge about another person's status. Reasonable cause to know suffices in those instances.[4]

3. The government's surplusage argument resembles its argument in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). There, an

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[4] The government suggests another anomaly, positing a hypothetical statute punishing anyone who "knowingly violates" another statute prohibiting "driving under the influence of alcohol causing the death of a pedestrian." GB 40. The government's example, though, is consistent with Mr. Rehaif's reading. Just as § 924(a)(2)'s "knowingly violates" requirement applies to § 922(g)'s first-listed element (status), in the government's example "knowingly violates" modifies the first-listed element ("driving under the influence of alcohol"). But the second-listed element in the government's example (causation) does not criminalize otherwise innocent conduct. Moreover, whether a legislature imposed a knowing causation requirement is irrelevant to the question here.

indictment charged that petitioner "did knowingly, intentionally and corruptly persuade . . . other persons, to wit: [petitioner's] employees, with intent to cause" them to withhold documents from, and alter documents for use in, "official proceedings, namely: regulatory and criminal proceedings and investigations." *Id.* at 702.[5] The issue was what it means to "knowingly . . . corruptly persuad[e]" another person "with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." 544 U.S. at 703.

The government suggested "knowingly" did not modify "corruptly persuades," but this Court rejected that argument because "that is not how the statute most naturally reads." *Id.* at 704-05. The statute first provided the *mens rea*—"knowingly"—and then a list of acts—"uses intimidation or physical force, threatens, or corruptly persuades." *Id.* at 705.

The government also suggested it was "questionable whether Congress would employ such an inelegant formulation as 'knowingly . . . corruptly persuades.'" *Id.* The Court rejected that argument as well: "Long experience has not taught us to share the Government's doubts on this score, and we must simply interpret the statute as written." *Id.* The Court thus held the "natural meaning" of the terms

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[5] The statute interpreted in *Andersen* provided: "Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause or induce any person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . ." *Id.* at 703; *see* 18 U.S.C. § 1512(b)(2)(A) and (B).

"knowingly" and "corruptly" provided "a clear answer": "Only persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuade.' And limiting criminality to persuaders conscious of their wrongdoing sensibly allows [the statute] to reach only those with the level of culpability we usually require in order to impose criminal liability." *Id.* at 705-06 (internal brackets, ellipses, and citation omitted). The case was remanded because the jury instructions failed to convey the requisite *mens rea*. *Id.* at 706. The same result is warranted here.

C. Mr. Rehaif's Reading is Consistent with Background Assumptions about *Mens Rea* in Criminal Statutes.

Missing from the government's brief is the overarching principle of statutory construction that a "scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *Staples v. United States*, 511 U.S. 600, 605 (1994). Rather than contend with that principle, the government invents its own "general principle" and rule of "typical practice," under which the government does not have to prove a defendant knew his status. GB 18-19, 22-23. The government contends "[l]ittle reason exists to conclude that Congress deviated from its normal approach" in § 922(g). GB 24.

The cases and statutes the government cites, however, are textually distinguishable, inapposite, or support Mr. Rehaif. For instance, some statutes make clear that a knowing *mens rea* does not apply to being a public official, officer, or parent. GB 23-24 (citing 18 U.S.C. § 201(b)(2); 18 U.S.C. § 1924(a); 18 U.S.C.

§ 2251(b)).[6] Others involve "public welfare" offenses, which have been long held to not require a *mens rea*. GB 23 (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 561-65 (1971) (dealing with sulfuric and other dangerous acids); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342-43 (1952) (involving explosive, flammable materials)); GB 44 (citing *United States v. Freed*, 401 U.S. 601 (1971) (addressing possession of unregistered grenades)).

Moreover, whether the "typical practice" in the immigration context is to impose restrictions based on status is irrelevant to whether "knowingly violates" applies to § 922(g)'s status element. GB 24-25. Unlike immigration statutes, §§ 924(a)(2) and 922(g) are informed by a "long tradition of widespread lawful gun ownership by private individuals in this country." *Staples*, 511 U.S. at 610. Further, the statutes the government cites (28 U.S.C. §§ 1864 and 1865(b)(1) and (5)) merely outline the procedures by which federal district courts determine who may serve on a jury. Those provisions, however, say nothing about § 924(a)(2)'s *mens rea* requirement. True enough, it is a crime for an alien to knowingly or willfully make a false statement about his status on a federal form. 18 U.S.C. § 1001; *see also* 18 U.S.C. § 924(a)(1)(A) (criminalizing "knowingly" make any false statement or representation when purchasing a firearm). But that supports Mr. Rehaif because it reflects Congress's understanding that people can make reasonable mistakes about their status.

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[6] The government also cites 21 U.S.C. § 861. GB 23. But that statute is "intended to protect a vulnerable class defined by age," thereby implicating special concerns that have led courts to construe narrowly *mens rea* requirements in similar exceptional contexts. *United States v. Chin*, 981 F.2d 1275, 1280 (D.C. Cir. 1992).

II. APPLYING A KNOWING *MENS REA* TO § 922(g)'S STATUS ELEMENT IS CONSISTENT WITH THIS COURT'S PRECEDENT AND EASY TO APPLY.

Attempting to overcome the plain text and structure of the statutes and the presumption that a *mens rea* applies to all substantive elements criminalizing otherwise innocent conduct, the government presents several unpersuasive arguments. Contrary to the government's contentions, knowledge of the law is unnecessary to apply "knowingly violates" to § 922(g)'s status element, there is no conflict between Mr. Rehaif's reading and *Old Chief*, and few defendants will go to trial solely to contest knowledge of status.

A. Applying a Knowing *Mens Rea* to § 922(g)'s Status Element Does Not Require Knowledge of the Law.

The government contends that requiring a knowing *mens rea* for § 922(g)'s status element would require knowledge of the law and "ignorance of the law is no defense." In support of its position, the government suggests Congress would have used "willfully" rather than "knowingly" had it intended a person in § 922(g) to know about his legal status. GB 19-21.

But as the government acknowledges (GB 19), Mr. Rehaif never argues "knowingly violates" requires a willful intent, *i.e.*, proof he knew his conduct was unlawful. *See, e.g., Bryan*, 524 U.S. at 193. That Congress used "knowingly violates" in § 924(a)(2) as opposed to "willfully" is therefore irrelevant.[7]

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[7] The government seeks to buttress its claim by pointing to Congress's use of "knowingly" in § 924(a)(2)'s neighboring provision, § 924(a)(1). "Knowingly," however, has the same meaning in both subsections—knowledge of the facts. *See Bryan*, 524 U.S. at 193.

Moreover, Mr. Rehaif's reading accords with how this Court applies a knowing *mens rea* to elements containing a legal component. For instance, *Liparota* involved a federal statute that criminalized "knowingly" transferring a food stamp "in any manner not authorized by [the statute] or the regulations." 471 U.S. at 420. The Court concluded "knowingly" required "the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations." *Id.* at 433. The Court observed that, "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.* at 426.

Another example is *McFadden*, which addressed 21 U.S.C. § 841's prohibition on "knowingly" distributing "controlled substances." 135 S. Ct. at 2302. The Court found the "knowledge requirement can be established in two ways." *Id.* at 2305. First, it can be established by evidence a defendant knew the substance is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the substance's particular identity. Second, it can be established by evidence the defendant knew the specific analogue, even if he did not know its legal status as an analogue. *Id.*

As *Liparota* and *McFadden* demonstrate, there is no barrier to applying a knowing *mens rea* to § 922(g)'s status element, even though some of the prohibited statuses have legal components. In a § 922(g) prosecution the government must establish certain facts to prove the defendant's status to the jury. *See, e.g.*, Doc. 69 at 11-12, 17; Doc. 109 at 168-69, 171. Mr. Rehaif's reading simply requires the government to prove a defendant knew those facts. In Mr. Rehaif's case, for instance, the government could attempt to

establish he knew he was an alien illegally or unlawfully in the United States by establishing the facts that: (1) he knew he was admitted into this country on a student visa with specific requirements, and (2) he knew he violated those requirements. The district court, though, instructed the jury that: "The United States is not required to prove that the Defendant knew that he was illegally or unlawfully in the United States." Doc. 69 at 16; Doc. 109 at 170. It thus *removed* from the jury's consideration *any* defense concerning lack of knowledge.

Finally, the government cites *Hamling v. United States*, 418 U.S. 87, 121 (1974), for the proposition that "this Court has repeatedly rejected arguments 'that the prosecution must prove a defendant's knowledge of the legal status' of items, persons, or actions as a prerequisite to a criminal conviction[.]" GB 22-23. But *Hamling* merely held that a federal obscenity statute's scienter requirement extends only to knowledge of the factual contents of expression, not to knowledge of its legal status as obscene. 418 U.S. at 123. That holding fits Mr. Rehaif's reading of "knowingly violates," which requires knowledge of the facts forming a § 922(g) offense, not knowledge of the law.

B. Mr. Rehaif's Reading is Consistent with *Old Chief*.

The government relies on *Old Chief* to contend Mr. Rehaif's interpretation of § 924(a)(2) is incorrect. GB 8-14, 26-29, 37-39. Mr. Rehaif's reading of § 924(a)(2), though, comports with both the statutory text and *Old Chief*.

In *Old Chief*, this Court considered whether a district court abuses its discretion in a § 922(g)(1) trial when it rejects a defendant's offer to stipulate to the fact of his prior conviction. 519 U.S. at 174. Relying on

Fed. R. Evid. 403, this Court concluded that, when a defendant offers to stipulate to the fact of his prior conviction, the unfair prejudice of the name and nature of the prior conviction substantially outweighs its probative value. *Id.* at 191-92. The Court made clear its "holding is limited to cases involving proof of felon status." *Id.* at 183 n.7.

The government nonetheless contends an essential premise of *Old Chief* was that the government must prove knowledge as to only the firearm possession and not felon status. GB 26-29. In resolving the Rule 403 unfair-prejudice issue, however, the Court did not narrow § 924(a)(2)'s *mens rea* requirement. The defendant in *Old Chief* did not contest his felony conviction or his knowledge of it. 519 U.S. at 175. *Old Chief* therefore did not decide the statutory interpretation question now before this Court.

Mr. Rehaif's interpretation adheres to both the statutory text and *Old Chief*. Reading "knowingly violates" to require the government to prove the defendant knew his status affords a jury trial for those defendants, like Mr. Rehaif, who contest that element. *See, e.g.*, *Games-Perez*, 667 F.3d at 1143 (Gorsuch, J., concurring) ("Mr. Games-Perez concedes he knowingly possessed a firearm but protests that he had no idea he was a convicted felon."). As the government suggests, the number of such defendants may be few. GB 34.

At the same time, Mr. Rehaif's interpretation accords with *Old Chief*'s Rule 403 analysis. In a § 922(g)(1) prosecution, when a defendant neither contests his felony conviction nor his knowledge of it, the same Rule 403 decision applies—a court must accept a defendant's offer to stipulate to his felon status and knowledge of it. 519 U.S. at 174, 186-92. As this Court concluded in *Old Chief*, the name and

nature of the conviction presents a risk of unfair prejudice in a § 922(g)(1) prosecution. *Id.* at 185. A defendant's offer to stipulate to knowledge of his felon status would be "not merely relevant but seemingly conclusive evidence of the element." *Id.* at 186.

A defendant's stipulation that he knew his felon status would be "at least equivalent" to the evidence the government would present to prove knowledge. *See id.*[8] The government's assertion that proving a defendant knew his status will be "complicated" (GB 11, 36-37) only underscores that a defendant's stipulation to his knowledge will be at least equivalent, if not superior, to the evidence the government would seek to present.

Finally, *Old Chief* does not depend on the premise that the government must prove knowledge as to only the firearm possession. Indeed, the government's own argument demonstrates Mr. Rehaif's reading will not overrule *Old Chief*. As the government recognizes, the evidence the government would rely on to prove the defendant knew his felon status is "extraneous to the defendant's illegal firearm possession." GB 12. A defendant's offer to stipulate to his felon status and knowledge of it thus fall squarely within this Court's holding in *Old Chief*, 519 U.S. at 190-92. Mr. Rehaif's interpretation of § 924(a) therefore comports with the statutory text and does not undermine *Old Chief*.

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[8] For example, suppose a prosecutor presents the judgment and transcript from the prior proceeding showing the defendant was clearly advised he was convicted of a crime punishable by more than one year in prison. From that evidence, the prosecutor could argue the defendant must know his felon status. But a defendant's admission that he knew his felon status would be at least equivalent to the judgment and transcript, without the unfair prejudice of the details concerning the name and nature of the conviction.

C. Mr. Rehaif's Reading is Easy to Apply.

1. According to the government, adopting Mr. Rehaif's position would "unrealistically presume a defendant to be unaware of his own personal characteristics" and "would require proof of knowledge that all but the rarest defendants will in reality have." GB 14. Being an alien in the United States illegally, however, is not a "personal characteristic." It is a fact-driven status. The law does not presume a defendant is aware of his status. What then remains of the government's pragmatic complaint is that it must prove Mr. Rehaif knew his status.

In a small but significant number of cases, defendants can raise a viable lack-of-knowledge defense concerning their status. *See* Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 Hastings L.J. 137, 169-70 & nn.169-72 (2007) (collecting cases in which defendants had viable challenges to their knowledge of being a convicted felon but were barred at trial from arguing they had an innocent state of mind); *United States v. Games-Perez*, 695 F.3d 1104, 1117 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc).

2. Nonetheless, the government asserts that Congress has "sound reasons" for requiring proof of knowledge of the second, but not the first, substantive element of § 922(g). GB 34. The government's speculation about potential effects fails to overcome the plain text of the statutes.

(a) Practical Effect. The government asserts that applying a knowing *mens rea* to § 922(g)'s status element will have "little practical benefit." GB 34. This assertion misses the point that reasonable mistakes regarding the § 922(g) categories do exist.

For example, "it is common for noncitizens brought to the U.S. as young children to discover that they lack U.S. citizenship when they are in high school or when it is time to apply to college." Brief of Amicus Curiae of the National Immigrant Justice Center in Support of Petitioner 18, *Rehaif v. United States*, No. 17-9560 (Mar. 1, 2019) (citing David Martinez, *I didn't know I was undocumented* (Dec. 30, 2014) https://www.cnn.com/2014/06/25/living/david-martinez-undocumented-immigrant-irpt/index.html)).

Other examples include when judges misstate facts, *see, e.g.*, *Games-Perez*, 667 F.3d at 1137-39; or when the statute is a "wobbler," which has both felony and misdemeanor options. *See, e.g.*, *United States v. Bridgeforth*, 441 F.3d 864, 870-72 (9th Cir. 2006); *United States v. Crooked Arm*, 853 F.3d 1065 (9th Cir. 2017).

The government acknowledges *some* defendants might not know their status. GB 34. Yet it opts to sacrifice the liberty of the few on the altar of expediency based on the alleged burdens and complexities of proving knowledge.

(b) Burden on government. The government also vacillates between the burden of proving the defendant's knowledge of his status being either too difficult or too easy. GB 35-37. The government cannot have it both ways. To the extent it is too difficult, the government overstates the potential problems it may encounter if it must prove knowledge of the facts attendant to status. GB 37-38. Normally, evidence the government already marshals to prove status also proves knowledge of status.

To the extent it is too easy, that disproves the government's theory that countless defendants will go to trial solely to contest knowledge of status. In fact, in

most cases, defendants will invoke *Old Chief* because such proof will not be an issue.

(c) Unfairness to defendants. The government also speculates that proving a defendant's knowledge of his status "would fundamentally alter the nature of the trial." GB 13, 37. The government's case of primary reliance, *Old Chief*, counsels against that. *See supra* at II.B. Moreover, it is not unfair to require the government to carry its burden of proof, particularly when a defendant is genuinely mistaken about his status.

III. MR. REHAIF'S READING IS CONSISTENT WITH FOPA'S HISTORY.

The government claims Congress added "knowingly" to § 924(a)(2) to codify § 922(g)'s pre-FOPA *mens rea* requirements. GB 32. But "when Congress alters the words of a statute, it must intend to change the statute's meaning." *United States v. Wilson*, 503 U.S. 333, 336 (1992). Thus, Congress's addition of "knowingly" must have meant something other than to codify the status quo. Given the near-uniform pre-FOPA interpretation requiring a *mens rea* for only possession, that "something" must have been applying a *mens rea* to § 922(g)'s other substantive element—status.[9]

The government ignores this history, wading through Senate and House reports for evidence of

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[9] The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), does not suggest otherwise. GB 41-42. The ACCA is a sentencing-enhancement provision applicable to only certain defendants, and its applicability is not determined by the jury at trial but by the court at sentencing. *See, e.g., Descamps v. United States*, 570 U.S. 254, 258-71 (2013). The ACCA does not define the underlying crime, as the government recognizes (GB 42), and therefore does not support the government's attempt to narrow § 924(a)(2).

congressional intent to support its position. GB 29-32. But "whatever Congress's *intent* may have been, any statutory interpretation must take reasonable account of the language Congress *actually adopted*." *Games-Perez*, 667 F.3d at 1144 (Gorsuch, J., concurring).[10] Here, the "most natural reading" of "knowingly violates" is that it applies to both of § 922(g)'s substantive elements, status and possession. *See, e.g.*, *McFadden*, 135 S. Ct. at 2304.

The government further suggests "knowingly violates" applies to only § 922(g)'s possession element because Congress's overall concern was protecting law-abiding citizens and keeping guns away from potentially dangerous people. GB 32-33, 42-43. But "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). Instead, Congress generally reserves criminal sanctions for those who act with full knowledge of the facts that make their conduct unlawful. *See Staples*, 511 U.S. at 605.

Finally, the government relies on Congress's inaction since enacting FOPA as evidence that "knowingly violates" applies to only the possession element. GB 33. But "[c]ongressional inaction cannot amend a duly enacted statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 186 (1994) (citation omitted). The Court does "not expect

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[10] Likewise, amicus's policy arguments based on state prohibited possessor statutes are unpersuasive because "state laws are written differently" and "[n]one adopts a mens rea through a specifically applicable separate statutory provision like §§ 922(g) and 924(a)(2)." Brief Amicus Curiae of Everytown for Gun Safety in Support of Respondent 4-5, *Rehaif v. United States*, No. 17-9560 (Apr. 1, 2019).

Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation [of a statute]. In short, the original legislative language speaks louder than such judicial action." *Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947). When, as here, Congress has not "comprehensively revised a statutory scheme but has made only isolated amendments," this Court has "bluntly" stated: "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks omitted).

IV. THE RULES OF CONSTITUTIONAL AVOIDANCE AND LENITY SUPPORT MR. REHAIF.

Two additional rules of statutory construction support construing "knowingly violates" to require proof of both § 922(g)'s substantive elements—the rules of constitutional avoidance and lenity.

In *Staples*, this Court relied on the "long tradition" and "common experience" of lawful gun possession in this country to require proof a defendant knew the characteristics of a gun that made it criminal under 26 U.S.C. § 5861(d). 511 U.S. at 610-11, 619. Just as all guns are not prohibited, not all individuals are prohibited from possessing guns. Mr. Rehaif's reading gives full force to § 924(a)(2)'s *mens rea* requirement and avoids the due process concern of imposing severe penalties on someone who did not know the one fact—his status—that made his firearm possession criminal. *See Games-Perez*, 667 F.3d at 1145 (Gorsuch, J., concurring). The government's narrow reading of

§ 924(a)(2) should therefore be rejected. *See Clark* v. *Martinez*, 543 U.S. 371, 385 (2005).[11]

Regarding the rule of lenity, if the Court is left with any doubt about whether "knowingly violates" applies to § 922(g)'s status element, it should read the statutes in Mr. Rehaif's favor. *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015).

V. HARMLESS ERROR DOES NOT APPLY.

The government's final argument is that any error is harmless because, based on the trial evidence, any jury would have convicted Mr. Rehaif. GB 46-48.

When a faulty jury instruction prevents the jury from hearing or considering a planned defense and the evidence supporting it, harmless error cannot be established by looking solely at the government's evidence in the light most favorable to the government. A remand is appropriate to permit the lower court to determine in the first instance if the error is harmless. *See Neder v. United States*, 527 U.S. 1, 25 (1999).

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[11] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978), and *Freed*, 401 U.S. at 607, concerned "public welfare" statutes and are therefore distinguishable. GB 44; *Staples*, 511 U.S. at 608-12.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICUS CURIAE* EVERYTOWN FOR GUN SAFETY IN SUPPORT OF RESPONDENT

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A Bill to Provide for the Uniform Regulation of Revolver Sales (1922), reprinted in *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-Fourth Annual Meeting* (1924) 7
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David T. Hardy, *The Firearms Owners Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585 (1986) 8
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INTEREST OF *AMICUS CURIAE*[1]

Everytown for Gun Safety is the nation's largest gun-violence-prevention organization, with over five million supporters across all fifty states. It was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combatting illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after twenty children and six adults were murdered in an elementary school in Newtown, Connecticut. Everytown also includes a large network of gun-violence survivors who are empowered to share their stories and advocate for responsible gun laws.

Everytown works to promote and support public safety measures that can save lives, including laws that keep guns out of the hands of people with dangerous histories, such as felons, domestic abusers and those with dangerous mental illnesses.

Everytown has drawn on its expertise to file amicus briefs in numerous cases implicating gun safety issues, including in briefs to this Court about the proper interpretation of federal firearms law, offering historical and doctrinal analysis that might otherwise be overlooked. *See, e.g.*, *Voisine v. United States*, 136 S. Ct. 2272 (2016); *United States v. Castleman*, 572 U.S. 157 (2014); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc); *Peruta v. Cty. of San*

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[1] The parties have consented to the filing of this brief, and no counsel for any party authored it in whole or part. Apart from amicus curiae and their counsel, no person contributed money intended to fund the brief's preparation and submission.

Diego, 824 F.3d 919 (9th Cir. 2016) (en banc). It seeks to do the same here.

INTRODUCTION AND SUMMARY OF ARGUMENT

The brief of the United States persuasively explains why the text, circuit court case law, and legislative history strongly support the conclusion that prosecutions under 18 U.S.C. § 922(g) and 18 U.S.C. § 924(a)(2) do not require the government to prove that a defendant had knowledge of his prohibited status. This brief is intended to provide the Court with an additional body of law reinforcing this consensus view: state court decisions interpreting and applying the state law counterparts to § 922(g).

These state laws, on the books in nearly every jurisdiction in the country, arose out of the same legislative efforts in the 1920s and 1930s that led to the current federal prohibited possessor statute, and they continue to be interpreted in parallel to federal law today. Like the virtually unanimous federal courts of appeals, state courts too have consistently held that the government is *not* required to prove a criminal defendant's knowledge of his prohibited status (*i.e.*, that he is a felon or a convicted domestic abuser or within one of the other prohibited categories set forth in the statute). Indeed, as the Oregon Supreme Court observed in 2011, "[e]very court—state and federal—that has considered the question has held that no such proof is required." *State v. Rainoldi*, 268 P.3d 568, 577 n.1 (Or. 2011).

Petitioner asks this Court to redefine this well-established standard in a way that will impact not only his prosecution, but the prosecutions of all those who violate the federal prohibition on certain categories of people possessing firearms. That is a dangerous course.

Section 922(g) and its state counterparts are among the most important tools law enforcement has for preventing gun violence. In 2017 alone, there were over six-thousand convictions for violating 18 U.S.C. § 922(g), about nine percent of all federal convictions. United States Sentencing Commission. *Quick Facts: Felon in Possession of a Firearm* (2018), https://bit.ly/2Ce9Isn. And, as this Court has made clear, "Congress sought to rule broadly" in enacting the federal prohibition, so as "to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (quoting 114 Cong. Rec. 14773). States have pursued the same core goal through their own parallel laws. *See, e.g.*, *People v. DeWitt*, 275 P.3d 728, 736 (Colo. App. 2011) (state prohibited possessor law intended to prevent "all convicted felons from possessing a firearm to avoid 'substantial risk of harm to the public'").

Prohibited possessor laws at both the federal and state levels thus punish the possession of firearms by "presumptively risky people," *Dickerson v. New Banner Inst.*, 460 U.S. 103,112 n.6 (1983), who are most likely to commit future acts of violence. The data back this up. For example, according to a Department of Justice analysis, more than thirty-nine percent of felons (or, more specifically, state prisoners

sentenced to a year or more in prison)—who are prohibited from firearm possession by § 922(g)(1)—were arrested for a violent crime within nine years of being released from prison.[2] Similarly, one study found that more than fifty percent of those convicted of a domestic violence offense—who are prohibited from firearm possession by§ 922(g)(1) or § 922(g)(9)—are rearrested for another domestic violence crime within ten years, and even more are rearrested for nondomestic violence crimes.[3] And, significantly, the presence of a firearm in a domestic violence situation makes it five times more likely that a woman will be killed.[4]

Like § 922(g)(1), state prohibited possessor statutes are also an essential tool for local police and prosecutors to prevent gun violence in their communities. Every state has laws prohibiting firearm possession by at least some of the categories of people listed in § 922(g). And each of these laws, like § 922(g)(1), prohibits firearm possession by at least some felons.[5]

To be sure, these state laws are written differently from the federal statute. None adopts a mens rea

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[2] Mariel Alpher et al., U.S. Dep't of Justice, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)* 11 tbl.7, 15 (2018), https://bit.ly/2IBxgrR.

[3] Tara N. Richards et al., *A 10-year Analysis of Rearrests Among a Cohort of Domestic Violence Offenders*, 29 Violence & Victims 887, 897 (2014).

[4] Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Public Health 1089, 1092 (2003).

[5] An appendix listing citations for current state prohibited possessor statutes is attached to this brief. Some of these statutes may have been revised since the date of the decisions cited in this brief.

through a specifically applicable separate statutory provision like §§ 922(g) and 924(a)(2). They also vary from jurisdiction to jurisdiction in several respects, including who is prohibited and for how long, whether an intent standard is explicitly set forth in the statute, and the level of that intent. For example, the prohibited possessor laws in more than thirty states and the District of Columbia lack any mens rea requirement in the statutory text.[6] In contrast, prohibited possessor laws of a smaller number of other states include statutory mens rea provisions that are unambiguously applicable only to possession.[7]

Notwithstanding these and other textual differences, and just like the federal courts when it comes to § 922(g), state courts applying and interpreting their prohibited possessor statutes are in agreement on one thing: a defendant's knowledge of his prohibited status is not an element required to be proved for

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[6] *See* the list of state prohibited possessor statutes set forth in the appendix for Alabama, Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington West Virginia, and Wisconsin.

[7] *See, e.g.* Wyo. Stat. Ann. § 6-8-102 ("Any person who has previously pleaded guilty to or been convicted of committing or attempting to commit a violent felony . . . who uses or knowingly possesses any firearm" is guilty of a felony.); Iowa Code § 724.26 (prohibited possessor statute providing that "[a] person who is convicted of a felony . . . who knowingly has under the person's dominion and control or possession . . . a firearm or offensive weapon is guilty of a class 'D' felony").

conviction. This consistent state-level judicial and legislative understanding provides an additional body of authority supporting and reinforcing the broad national consensus that violating prohibited possessor statutes simply means knowingly possessing a firearm subsequent to becoming a member of the prohibited class. The shared federal-state history and judicial approach also raises the concern that the Court's decision in this case as to the proper interpretation of the federal prohibitor statute could have wider and unintended ramifications for the interrelated state prohibitor regimes as well.

ARGUMENT

I. Section 922(g) and Its State Law Counterparts Share a Common History and Development and Have Been Interpreted by Courts in Parallel.

A. The History and Development of Modern Prohibited Possessor Laws.

18 U.S.C. § 922(g) and analogous state prohibited possessor laws share a common history, which began at the state level. Starting in the 1920s, in response to rising violent crime, states began to prohibit the possession of firearms by certain categories of persons who "pose a risk to the public." *Rainoldi*, 268 P.3d at 575-77 (summarizing development of state prohibited possessor laws).[8] This effort was initially led by

[8] While the current state and federal prohibited possessor laws stem directly from legislation first passed in the 1920s and

the United States Revolver Association (USRA), a marksmanship group, which drafted model legislation to regulate firearms. *Id.* The USRA Model Act prohibited the possession of firearms by anyone "convicted of a felony against the person or property of another or against the Government of the United States or any State," among other classes of persons. *A Bill to Provide for the Uniform Regulation of Revolver Sales* (1922), reprinted in *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-Fourth Annual Meeting* 728-29 (1924). Several states quickly enacted the USRA Model Act in an effort to reduce violent crime, beginning with Connecticut and California. *See, e.g.*, 1923 Cal. Stat. 695, ch. 339; 1923 Conn. Pub. Acts 3707, ch. 252.

The USRA Model Act's success led to its adaptation by the National Conference of Commissioners on Uniform State Laws, which modified the Model Act's prohibitions to restrict anyone "convicted . . . of a crime of violence" from possessing firearms and adopted it as the Uniform Firearms Act (UFA). *See Report of Committee on An Act to Regulate the Sale and Possession of Firearms*, published in *Fortieth Conference Handbook of the National Conference of the Uniform State Laws and Proceedings of the Annual Meetings* 530, 537 (1930). Several states used the UFA as a model, as did Congress when it passed gun

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'30s, prohibitions on the possession of firearms by so-called "unvirtuous citizens," including even nonviolent felons and other criminals, date back to the founding. *See Medina v. Whitaker*, 913 F.3d 152, 158-60 (D.C. Cir. 2019) (quoting *United States v. Yancy*, 621 F.3d 681, 684-85 (7th Cir. 2010)) (summarizing founding-era history).

regulations for the District of Columbia in 1932. Act of July 8, 1932, Pub. L. No. 72-275, ch. 465, § 4, 47 Stat. 650; *see, e.g.*, 1931 Pa. Laws 497; 1935 S.D. Sess. Laws 355.

In 1938, Congress adopted the language of the UFA in passing the first national prohibition on the possession of firearms by anyone "who is under indictment or has been convicted of a crime of violence or who is a fugitive from justice." *An Act to Regulate Commerce in Arms*, Pub. L. No. 75-785, ch. 850, § 2, 52 Stat. 1250 (June 30, 1938). States continued to pass their own prohibited possessor laws in the years that followed. *See, e.g.*, 1955 Nev. Stat. 185, ch. 132 ("no person who has been convicted of a felony . . . shall own or have in his possession . . . any pistol, revolver or other firearm capable of being concealed"). In 1968, again facing rising crime as well as a string of assassinations, Congress passed the Gun Control Act, which expanded the federal prohibited possessor categories to most of those now found in the current law, including anyone convicted of a felony. Pub. L. No. 90-618, 82 Stat. 1213-36 (Oct. 22, 1968). And, finally, in 1986, the Firearms Owners Protection Act (FOPA) added an express "knowingly" requirement in § 924(a)(2) (*see* Pub. L. No. 99-308, 100 Stat. 449)—which, as the United States has explained, had already long been applied to § 922(g) prosecutions by the federal courts. U.S. Br. 29.[9]

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[9] In passing FOPA, Congress distinguished between violations of the dealer licensing provisions in 18 U.S.C. § 921, which had to be violated "willfully," and the criminal provisions in § 922, which preserved the court-acknowledged "knowingly" standard. *Compare* 18 U.S.C. § 924(a)(1)(D) (2012), *with id.* § 924(a)(2); *see also* David T. Hardy, *The Firearms Owners Protection Act: A*

Since passage of the Gun Control Act and FOPA, the close relationship and interaction between federal and state prohibited possessor laws has continued. Many states have amended their laws to be more consistent with the language and interpretation of the federal statute. *See, e.g.*, 2014 La. Acts 1573, Act. No. 195 (codified at La. R.S. § 14:95.10) (prohibiting those convicted of domestic violence from possessing firearms, consistent with the federal prohibitor at § 922(g)(8)); 2010 Iowa Acts 358, ch. 1083 (codified at Iowa Code § 724.26(3) (prohibiting those under final domestic violence restraining orders from possessing firearms, consistent with the federal prohibitor at § 922(g)(9)). States have also continued to influence the development of the federal prohibited possessor law. Most notably, in 1996, Congress followed the lead of six states and the District of Columbia by prohibiting the possession of firearms by those convicted of domestic violence offenses. Pub. L. 104–208, 110 Stat. 3009-371 (codified at 18 U.S.C. § 922(g)(9)); *see, e.g.*, 1994 Wash Sess. Laws 2196, 2217 ch. 6, § 402 (codified at Wash. Rev. Code Ann. § 9.41.040).

Historical and Legal Perspective, 17 Cumb. L. Rev. 585, 653 (1986) ("Certain offenses, distinguished by their more serious natures, are singled out for a requirement only that accused violators know of their actions. The remaining provisions of the Act require stiffer proof that the defendant 'willfully' violated the statute.")

B. State and Federal Courts Have Interpreted Their Prohibited Possessor Laws in Parallel.

This parallel development of state and federal prohibited possessor statutes is mirrored by the parallel development of state and federal interpretations and applications of the required mens rea under prohibited possessor laws. Despite significant differences in mens rea language and the precise scope of the prohibited possessor categories, federal and state courts have interpreted the status element of their prohibited possessor statutes roughly identically, with state courts at times relying on or citing federal case law, as well as that of sister states, for guidance on the application of their own prohibitions.

For example, in *State v. Howard*, a Kansas intermediate court of appeals found that "[a]lthough mental culpability varies based on the wording of a specific statute, . . . several other state and federal courts have interpreted similar felon-in-possession statutes and concluded that the prosecution does not have to prove the defendant knew of his or her felon status." 339 P.3d 809, 822 (Kan. Ct. App. 2014). Similarly, the Washington state intermediate court of appeals likewise looked to the federal courts' interpretation of § 922(g) in rejecting the argument that the state's prohibited possessor statute required "knowledge that the possession is unlawful." *State v. Semakula*, 946 P.2d 795, 798 (Wash. Ct. App. 1997). And in *Saadiq v. State*, the Iowa Supreme Court explained that its application of that state's law was "in accord with the California Supreme Court as well as federal decisions under the federal statute proscribing

firearm possession by convicted felons." 387 N.W.2d 315, 323-24 (Iowa 1986).

II. State Courts Have Consistently Interpreted their Prohibited Possessor Laws as Not Requiring a Mens Rea for Prohibited Status.

Like the federal courts of appeals, state courts have consistently interpreted state prohibited possessor laws to require a mens rea only for the possession element of the crime. While there are certainly significant variations in the statutory language and legal traditions across the states, the understanding on this issue has been remarkably consistent. *See, e.g.*, *Rainoldi*, 268 P.3d at 577 n.1 (citing cases). Whether based on specific or general statutory text or other judicial interpretation of the state's criminal law, each of these state cases reaches the same conclusion – consistent with the conclusion reached by the federal circuits and urged here by the United States: there is not and should not be a mens rea requirement for the prohibited status element of prohibited possessor crimes.[10]

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[10] Everytown was able to find relevant materials for forty-four states and the District of Columbia. Massachusetts does not have an analogous law and instead applies its prohibited possessor categories through its licensing law. Everytown was unable to find relevant materials from Montana, South Dakota, Rhode Island, South Carolina, and West Virginia.

A. State Courts Have Interpreted Prohibited Possessor Statutes Lacking a Statutory Mens Rea to Require Knowledge of Possession, But Not of Prohibited Status.

As noted above (at p. 5 n.6), the majority of state prohibited possessor laws lack a specific statutory mens rea. The courts in these jurisdictions have therefore decided the scope of the mens rea requirement by looking to a catch-all mens rea statute or through case law requiring a guilty mind to convict for most criminal statutes. In these states, the courts have consistently applied a knowledge requirement to the possession element, while not requiring any mens rea for the prohibiting status.

In *State v. Rainoldi*, for example, the Oregon Supreme Court rejected a claim that in order to be guilty of "felon in possession of a firearm, the jury had to conclude that defendant knew that he was a felon." 268 P.3d at 570. Oregon law required "a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state." *Id.* However, the court rejected the application of a culpable mental state to the status element, finding it inconsistent with the text of the statute, with "the nature of the element at issue" which pertains to "the status of the defendant" and not his conduct, and with the underlying legislative purpose to prevent the possession of firearms by individuals with dangerous histories. *Id.* at 573-578.[11]

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[11] The *Rainoldi* case addresses Or. Rev. Stat. Ann. § 166.270, a prohibition on possession of firearms by felons that does not include mens rea in the statute's text. Another broader prohibited possessor statute, Or. Rev. Stat. Ann. § 166.250,

Other states with similar statutes have reached the same result. In *State v. Howard*, a defendant appealed the exclusion of evidence from his prohibited possessor trial, claiming it was exculpatory because it proved he did not know he was a felon. 339 P.3d at 819. Kansas's prohibited possessor statute does not set forth a mens rea, so the defendant relied on another statute, which makes a "culpable mental state . . . an essential element of every crime defined by this code." *Howard*, at 823 (citing Kan. Stat. Ann. § 21-5202). The court rejected this argument, finding: "[T]he State only has to prove the defendant intentionally, recklessly, or knowingly engaged in the conduct that constitutes the crime. Here the prohibited conduct is possessing the firearm." *Id.*; *see also State v. Reed*, 928 P.2d 469, 471 (Wash. Ct. App. 1997) (allowing evidence about defendant's lack of knowledge about previous conviction only as relevant to determining whether the prohibiting conviction was obtained in an unconstitutional manner and therefore could not serve as the predicate for the offense).

Other state courts interpreting prohibited possessor laws lacking a statutory mens rea have not directly addressed the argument that the prosecution should be required to prove knowledge of status. But in a number of these states the courts have upheld convictions obtained using jury instructions requiring mens rea only for the possession element, or have described the necessary elements of the crime as only requiring mens rea for the possession element. For example, in *State v. Stratton*, the New Hampshire Supreme Court found that "[t]he prosecution was

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requires knowing possession.

required to prove that the defendant knowingly owned, possessed or controlled the firearms and that he was a convicted felon." 567 A.2d 986, 990 (N.H. 1989). Similarly, in *Nicholson v. State*, an Alabama appellate court interpreted the state's prohibited possessor statute to require "knowing possession of the gun," and simply a "prior conviction for a crime of violence." 77 So.3d 1214, 1215-1216 (Ala. Crim. App. 2011). Many other states without statutory mens rea in their prohibited possessor statutes have taken the same path, requiring knowledge of possession but not of a defendant's prohibited status.[12]

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[12] **Arkansas:** *Fisher v. State*, 290 Ark. 490, 493-94 (Ark. Sup. Ct. 1986) ("[t]he requisite mens rea is that the defendant 'purposely, knowingly, or recklessly' . . . 'possess[ed] or own[ed] any firearm'"); **Connecticut:** *State v. Boyd*, 973 A.2d 138, 144 (Conn. App. Ct. 2009) (requiring intent to possess and status as a felon); **District of Columbia:** *Myers v. United States*, 56 A.3d 1148, 1149 (D.C. 2012) ("[T]he Government must prove. . . One, that the Defendant possessed a firearm; two, that he did so knowingly and intentionally. . . And three, that at the time the Defendant possessed the firearm, the Defendant had been convicted of a felony.") (internal quotation marks omitted); **Florida:** *Creamer v. State*, 605 So. 2d 541, 542-43 (Fla. Dist. Ct. App. 1992) (requiring prior felony conviction and knowing possession of a firearm); **Hawaii:** *State v. Valentine*, 998 P.2d 479, 482, 489 (Haw. 2000) ("A person commits the offense of Prohibited Possession of a Firearm if having been previously convicted of committing a felony he intentionally, knowingly or recklessly owns, possesses or controls any firearm."); **Idaho:** *State v. Dolsby*, 145 P.3d 917, 920 (Idaho Ct. App. 2006) ("[T]he act of knowingly possessing the firearm is all that the state is required to prove."); **Kentucky:** *Foister v. Commonwealth*, No. 2004-CA-002409-MR, 2005 WL 3334518, at *1, *3 (Ky. Ct. App. Dec. 9, 2005) (Commonwealth required to show defendant "knew the gun was present"); **Louisiana:** *State v. Storks*, 836 So. 2d 638, 640 (La. Ct. App. 2002) (to convict a defendant of illegal possession of a firearm by a

convicted felon, the State must prove that "the offender was aware that a firearm was in his presence and that the offender had a general criminal intent to possess the weapon"); **Maine:** *State v. Heald*, 382 A.2d 290, 297 (Me. 1978) ("Possession statutes such as 15 M.R.S.A. § 393, making it unlawful for a felon to possess a firearm, require no particular scienter, except the knowledge of the presence of the firearm and its character as such."); **Maryland:** *Samba v. State*, 49 A.3d 841, 858 (Md. Ct. of Spec. App. 2012) ("The possession charge requires an affirmative showing of knowledge in order to establish appellants dominion and control over the weapon."); **Michigan:** *People v. Tice*, 558 N.W.2d 245, 247-48 (Mich. Ct. App. 1996) (allowing defendant to argue he was not legally a felon, but not considering his lack of knowledge); **Mississippi:** *Billups v. State*, No. 2016-KA-01378-COA, 2018 Miss. App. LEXIS 461, *9-10 (Miss. Ct. App. 2018) (felon-in-possession statute requires that defendant "unlawfully, willfully, and feloniously . . . possess[ed] a firearm . . . and ha[ve] been previously convicted of a felony"); **Nebraska:** *State v. Hall*, No. A-15-548, 2016 Neb. App. LEXIS 125, *5-6 (Neb. Ct. App. June 21, 2016) (felon-in-possession conviction valid because there was sufficient evidence that defendant "knowingly possessed three firearms after having been previously convicted of a felony offense"); **New Mexico**: *State v. Haddenham*, 793 P.2d 279, 286 (N.M. 1990) ("[Defendant] only had to have known that the gun [possessed] was a firearm."); **Oklahoma:** *Williams v. State*, 565 P.2d 46, 49 (Okla. Crim. App. 1977) ("intent or knowledge" of possession necessary to convict defendant); **Pennsylvania:** *Commonwealth v. McGee*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 393, at *27 (Pa. C.P. Berks Cty., Feb 26, 2015) (possession element requires "both the knowledge to control and the intent to exercise that control"), *aff'd*, No. 73 MDA 2015, 2016 PA. Super. Unpub. LEXIS 259 (Pa. Super Ct. Jan. 29, 2016) **Tennessee:** *State v. Holman*, No. W201501744-CCA-R3-CD, 2016 Tenn. Crim. App. LEXIS 790, *7-8 (Tenn. Crim. App. 2016) ("'intent, knowledge, or recklessness suffice[] to establish the culpable mental state' . . . Here, the defendant, a convicted felon, acted at least recklessly by driving a vehicle that he knew had a firearm inside"); **Texas:** *Johnson v. State*, No. 01-13-00213-CR, 2014 Tex. App. LEXIS 3732, *4-5 (Tex. App. 2014) ("To establish unlawful possession of a firearm by a felon, the State must prove . . . that

In a number of other states where the prohibited possessor statutes do not set forth a mens rea, the courts have interpreted the prohibited possessor statutes to be strict liability offenses. This interpretation necessarily excludes a mens rea requirement for the status element. *See, e.g., People v. Nieto*, 247 Cal. App. 2d 364, 368 (Ct. App. 1966) (applying strict liability); *Malone v. State*, 786 S.E.2d 558, 560 (Ga. Ct. App. 2016) ("[T]he State need only prove that the accused is a convicted felon and in possession of a firearm." (internal quotation marks and citation omitted)).[13]

In practice, however, these strict liability states are not substantially different from other states' laws

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the accused was previously convicted of a felony offense and possessed a firearm. . . . Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed . . ."); **Vermont:** *State v. Stern*, 186 A.3d 1099, 1104-05 (Vt. 2018) (prohibited possessor conviction requires defendant to have "intentionally possessed a firearm").

[13] *See also Gabrelcik v. State*, No. A07-0627, 2008 Minn. App. Unpub. LEXIS 579, at *7 (Minn. Ct. App. 2008) ("In Minesota, the elements of the offense of being a person ineligible to possess a firearm do not include knowledge."); *Bibbins v. State*, 367 P.3d 750, 2010 WL 3341923, at *1 (Nev. 2010) (crime "completed when the ex-felon obtains possession of a firearm"); *State v. Jones*, 487 A.2d 1278, 1284 (N.J. Super. Ct. App. 1985) (applying strict liability, but requiring evidence that defendant intended to use the object as a deadly weapon); *State v. Bailey*, 757 S.E.2d 491, 493 (N.C. Ct. App. 2014) (applying strict liability but requiring something approaching knowledge to prove possession); *State v. Elred*, 564 N.W.2d 283, 290 (N.D. 1997) ("Section 62.1-02-01 does not have a culpability requirement. It is a strict liability statute."); *State v. Buchholz*, 723 N.W.2d 534, 538 (N.D. 2006) ("[t]he offense of felon in possession of a firearm is a strict liability offense").

with a mens rea requirement because possession is interpreted to require some level of knowledge. For example, in *In re Ronnie L.*, a minor defendant in a juvenile delinquency hearing was charged with possession of a firearm found in a jacket he had borrowed from a friend. 463 N.Y.S.2d 732, 732 (Fam. Ct. 1983). He claimed that he was unaware of the presence of the firearm and therefore could not be adjudicated delinquent. *Id.* The court accepted that defendant's lack of knowledge could be a defense, before ultimately rejecting it on the facts, finding that the prohibited possessor statute at issue is "a strict liability crime," but still requires "a voluntary act," which must be done "intentionally" or "knowingly." *Id.* at 733-34. The court acknowledged that the distinction between strict liability and knowledge in possession crimes was illusory because both "necessarily involve[] a culpable mental state." *Id.* at 734. Similarly, in Wisconsin, courts have interpreted the prohibited possessor statute "to impose strict criminal liability," *State v. Phillips*, 493 N.W.2d 238, 240 (Wis. Ct. App. 1992), but to convict under the statute the state is "required to show that the felon 'possessed' the firearm with knowledge that it is a firearm" and "knowingly had actual physical control" over it. *State v. Black*, 624 N.W.2d 363, 371 (Wis. 2001).

B. State Courts Have Also Interpreted Prohibited Possessor Statutes with a Textual Mens Rea Element to Exclude Knowledge of Status.

Like the federal law, several states' prohibited possessor statutes have a statutorily defined mens rea. In these cases, the mens rea applied through the statute consistently has been found to extend only to the prohibited possession, and not to the defendant's status as a person prohibited from possessing firearms.

One example is Colorado. Similar to the federal law, Colorado's prohibited possessor statute initially lacked a statutory mens rea, but was interpreted by the state courts to require knowledge of possession. *See People v. Tenorio*, 590 P.2d 952, 957 (Colo. 1979) (requiring knowledge of possession). Colorado's statute was subsequently amended, adding a mens rea requirement obligating prosecutors to prove a defendant "knowingly possesse[d], use[d], or carrie[d] upon his or her person a firearm. . . subsequent to the person's conviction for a felony." Colo. Rev. Stat. § 18-12-108. When a defendant in a prohibited possessor case claimed that the revised statute required the application of the "knowingly" mens rea to the prohibited status element of his crime, the court rejected that claim as inconsistent with the text and purpose of the statute. Instead, the court held, the "'[k]nowingly' mental state" applied only "to the possession element of the offense, and not to the prior felony conviction element." *DeWitt*, 275 P.3d at 735.

Other state courts, interpreting statutes with a statutory mens rea more clearly limited to only the

possession element, have unsurprisingly come to the same conclusion. The Wyoming Supreme Court found that "[t]he only mens rea requirement for a conviction is knowledge that the instrument possessed is a firearm" and that "no requirement exists that the defendant know his status as a convicted felon." *Poole v. State*, 152 P.3d 412, 414 (Wyo. 2007). The Iowa Supreme Court found that "[k]nowledge of felony status is not an element of this crime." *Saadiq*, 387 N.W. at 324. In *Kipp v. State*, the Delaware Supreme Court found that "to be guilty of the offense, the defendant need only know that he or she possessed the weapon." *Kipp v. State*, 704 A.2d 839, 842 (Del. 1998). And the Ohio Supreme Court likewise ruled that "the state need not prove a culpable mental state for the element that a defendant is under indictment for or has been convicted of [the legally relevant offense]." *State v. Johnson*, 942 N.E.2d 347, 348 (Ohio 2010); *see also Branch v. Commonwealth*, 593 S.E.2d 835, 836 (Va. Ct. App. 2004) ("the pertinent conduct proscribed . . . is merely that of 'being a felon' and 'knowingly and intentionally being in possession of a firearm'"); *Rhone v. State*, 825 N.E.2d 1277, 1286 (Ind. Ct. App. 2005) (Indiana law "does not require proof that [defendant] knew he was a serious violent felon"); *see also People v. Adams*, 903 N.E.2d 892, 896-97 (Ill. App. Ct. 2009) ("the State must show that the defendant had a prior felony conviction and knowingly possessed a firearm"); *State v. Harmon*, 541 P.2d 600, 602 (Ariz. Ct. App. 1975) ("The intent which the legislature has chosen to punish is the intent to possess the pistol."); *State v. Jones*, 865 S.W.2d 658, 662 (Mo. 1993) (applying a knowledge requirement to the possession element); *State v. Ojeda*, 350 P.3d 640, 645 (Utah Ct. App. 2015)

(distinguishing between prohibition on firearms possession by unlawful users of controlled substances, which requires no mens rea as to status, and the prohibition on those in possession of controlled substances, which statutorily requires knowledge or intent).[14]

C. State Courts Have Provided A Variety of Reasons for Excluding Knowledge of Status as an Element in Prohibited Possessor Crimes.

State courts interpreting statutes both with and without statutory mens rea provisions have offered a range of justifications for concluding that proof

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[14] While the case law cited above is all consistent in the result reached, model jury instructions from Hawaii and Alaska do extend mens rea to a defendant's prohibited status. *See* Hawaii Rev. Crim. Jury Instr. 15.07 ("There are five material elements of the offense of Possession or Control of a Firearm or Ammunition for a Firearm by a Person Convicted of Specified Crimes . . . . 5. That, . . . the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that he/she had previously been convicted of committing [a prohibiting crime]"); AK Pattern Jury Ins. – Crim. 11.61.200(A)(1) (requiring that "the defendant was aware of or recklessly disregarded the fact that he had been [convicted of a prohibiting crime] by a court of this state, a court of the United States, or a court of another state or territory"). As discussed above, however, Hawaii case law appears to be inconsistent with such an approach. *See Valentine*, 998 P.2d at 489 (prohibited possessor crime occurs when a defendant who "previously [was] convicted of committing a felony . . . intentionally, knowingly, or recklessly owns, possesses[,] or controls any firearm"). Alaska lacks sufficient case law to judge the significance of the model jury instruction.

of a defendant's knowledge of his prohibited status is not required. Many have broadly adopted the reasoning of the court of appeals here, distinguishing between a defendant's knowledge of his "own status" and his knowledge of his prohibited conduct. *United States v. Rehaif*, 888 F.3d 1138, 1146 (11th Cir. 2018); *accord Rainoldi*, 268 P.3d at 574 (distinguishing between "status" and "conduct" elements and finding that status "ordinarily does not require proof of a culpable mental state"); *State v. Valentine*, 998 P.2d 479, 486-88 (Haw. 2000) (distinguishing between "conduct," which requires mental culpability, and "attendant circumstances," which do not); *Saadiq*, 387 N.W.2d at 323 (general intent crimes require that defendant "intended to do the proscribed act") (citation omitted); *Howard*, 339 P.3d at 823 ("[T]he State only has to prove the defendant intentionally, recklessly, or knowingly engaged in the conduct that constitutes the crime. Here the prohibited conduct is possessing the firearm.").[15]

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[15] Contrary to petitioner's assertions, Pet. Br. 26-27, this approach is fully consistent with *Staples v. United States*, 511 U.S. 600, 619 (1994), and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73 (1994), because it still requires proof of a defendant's knowledge of the "elements of an offense that concern the characteristics of other people and things." *Rehaif*, 888 F.3d at 1146; *see* U.S. Br. 22-26, 44-45. Thus, while states overwhelmingly exclude knowledge of one's own status as an element, they universally require knowledge that the object possessed is a firearm. *See, e.g*, *Black*, 624 N.W.2d at 371 (to obtain a conviction under prohibited possessor law, "the State is only required to show that the felon 'possessed' the firearm with knowledge that it is a firearm"); *In re Ronnie L.*, 463 N.Y.S.2d at 734 (although statute was strict liability, it still required knowledge that the object possessed is a firearm).

State courts have also looked to the statutes' underlying policy when assessing whether to apply mens rea to the status element. In *Rainoldi*, for example, the Oregon Supreme Court found that the risk "that persons who have been convicted of a felony pose . . . to the public" "exists regardless of a person's knowledge of the legal significance of the conviction." *Rainoldi*, 268 P.3d at 577. Similarly, a Colorado intermediate court of appeals found that because the prohibited possessor statute's purpose is to prevent "all convicted felons from possessing a firearm to avoid 'substantial risk to the public,'" it would be "inconsistent . . . to require proof of defendant's knowledge of his or her convicted felon status before prohibiting the possession of a firearm." *Dewitt*, 275 P.3d at 736 (citation omitted).

* * * * *

The overwhelming body of federal and state precedent, legislative history, and case law applying and interpreting prohibited possessor statutes weighs strongly against revising the current interpretation of the federal law. Such a change, occurring thirty-three years after the enactment of the Firearms Owners Protection Act, and after multiple subsequent revisions of federal firearms law, *see* U.S. Br. 33 & n.*, would be inconsistent with the near-uniform interpretation of both § 922(g) and its state law counterparts. It would make prosecutions of those illegally in possession of firearms under § 922(g) more difficult. And while not binding on state courts, the Court's ruling here could also be used to call into question the settled application of any number of states' prohibited

possessor laws, which have been interpreted consistently with the federal law.

CONCLUSION

The judgement of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

State Prohibited Possessor Statutes

Ala. Code § 13A-11-72
Alaska Stat. § 11.61.200
Ariz. Rev. Stat. § 13-3102
Ark. Code Ann. § 5-73-103
Cal. Penal Code § 29800
Colo. Rev. Stat. § 18-12-108
Conn. Gen. Stat. § 53a-217
D.C. Code § 22-4503
Del. Code Ann. tit. 11, § 1448
Fla. Stat. Ann. § 790.23
Ga. Code Ann. § 16-11-131
Haw. Rev. Stat. Ann. § 134-7
Idaho Code Ann. § 18-3316
720 Ill. Comp. Stat. Ann. 5/24-1.1
Ind. Code Ann. § 35-47-4-5
Iowa Code § 724.26
Kan. Stat. Ann. § 21-6304
Ky. Rev. Stat. Ann. § 527.040
La. Rev. Stat. Ann. § 14:95.1
Me. Rev. Stat. tit. 15, § 393
Md. Code Ann., Pub. Safety § 5-133
Mich. Comp. Laws Serv. § 750.224f
Minn. Stat. Ann. § 624.713
Miss. Code Ann. § 97-37-5
Mo. Rev. Stat. § 571.070
Mont. Code Ann. § 45-8-313
Neb. Rev. Stat. Ann § 28-1206
Nev. Rev. Stat. Ann. § 202.360
N.H. Rev. Stat. Ann. § 159:3
N.J. Rev. Stat. § 2C:39-7
N.M. Stat. Ann. § 30-7-16

N.Y. Penal Law § 265.02
N.C. Gen. Stat. § 14-415.1
N.D. Cent. Code § 62.1-02-01
Ohio Rev. Code Ann. § 2923.13
Okla. Stat. tit. 21, § 1283
Or. Rev. Stat. § 166.250
Or. Rev. Stat. § 166.270
18 Pa. Cons. Stat. Ann. § 6105
R.I. Gen. Laws § 11-47-5
S.C. Code Ann. § 16-23-500
S.D. Codified Laws § 22-14-15
Tenn. Code Ann. § 39-17-1307
Tex. Penal Code § 46.04
Utah Code Ann. § 76-10-503
Vt. Stat. Ann. tit. 13, § 4017
Va. Code Ann. § 18.2-308.2
Wash. Rev. Code Ann. § 9.41.040
W. Va. Code § 61-7-7
Wis. Stat. Ann. § 941.29
Wyo. Stat. Ann. § 6-8-102

No. 17-9560

In The Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a keen interest in the issue presented. The question addresses the scienter requirement for prosecution of persons of various statuses who are prohibited from possessing firearms or ammunition. NACDL has long advocated for enforcement of rigorous scienter requirements in criminal prosecutions. The depth of its interest is manifest in *Without Intent*, a white paper produced in collaboration with the Heritage Foundation and published in April 2010. *See generally* Brian Walsh & Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent*

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[1] Counsel for all parties received timely written notice of NACDL's intent to file this brief. Letters of consent have been provided by both parties. No counsel of a party authored this brief in whole or part, and no person other than NACDL, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Requirement in Federal Law, at 3 (Heritage Foundation & NACDL 2010).

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is whether an individual may be imprisoned up to ten years for possessing a firearm or ammunition despite being unaware of the facts making that possession unlawful.

Congress in 18 U.S.C. § 924(a)(2) specified that "[w]hoever *knowingly violates* subsection . . . (g) of Section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both" (emphasis added). Subsection (g) of Section 922, in turn, provides that "[i]t shall be unlawful for any person" who qualifies for any of nine enumerated statuses to, among other things, "possess in or affecting commerce, any firearm or ammunition."

The question presented is whether an individual can knowingly violate Section 922(g) when he knows that he possessed a firearm or ammunition (which is not unlawful) but does not know that he qualifies for one of the nine enumerated statuses (which makes his possession unlawful). The answer is no.

One of the most fundamental precepts of our criminal justice system is that only an individual who acts with criminal intent (*mens rea* or scienter) is subject to punishment for commission of an offense. This

safeguard of individual liberty has endured for centuries to protect those accused of crimes from being punished for apparently innocent conduct. So essential is the requirement of *mens rea* that this Court interprets federal criminal statutes with a background presumption that such a requirement exists even when the statutory text is silent. The presumption is particularly strong where, as here, the element at issue distinguishes innocent conduct (possession of a firearm or ammunition) from unlawful conduct (possession of a firearm or ammunition *while* being an alien illegally or unlawfully within the United States). That the crucial element involves the status of the accused himself provides no reason to disregard this bedrock principle of criminal justice.

ARGUMENT

I. *MENS REA* IS A FOUNDATIONAL SAFEGUARD AGAINST PUNISHMENT FOR UNKNOWINGLY UNLAWFUL CONDUCT

Criminal law "governs the strongest force that we permit official agencies to bring on individuals." Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952). Accordingly, its prohibitions, commands, and penal power "must be firmly grounded in fundamental principles of justice." Walsh & Joslyn, *Without Intent*, at 3.

One such fundamental principle is that "wrongdoing must be conscious to be criminal." *Morissette v.*

United States, 342 U.S. 246, 252 (1952). This idea "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.*; *see also* Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv. L. Rev. 75, 81 (1908) ("It is a fundamental principle of the criminal law, for which no authorities need be cited, that the doer of a criminal act shall not be punished unless he has a criminal mind.").

This "core principle of the American system of justice" is deeply rooted in both Anglo-American law and its classical antecedents. Edwin Meese III & Norman L. Reiner, *Foreword* to Walsh & Joslyn, *Without Intent*, at vi. During the Hellenistic period, for example, philosophic sects "introduced moral concepts into legislation and thereby made it necessary to distinguish between the harmful result and the evil will" and to cabin punishment to the latter as much as possible. Max Radin, *Criminal Intent*, 7 Encyclopaedia Soc. Sci. 126, 126 (eds. Edwin R. Seligman & Alvin Johnson 1932). And, according to some scholars, criminal intent in Roman law "has roots as ancient as the founding of the city itself." Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 St. John's L. Rev. 725, 756 (2004).

The necessity of criminal intent arrived in England primarily through the church. *See* Albert Levitt, *Origin of the Doctrine of Mens Rea*, 17 Ill. L. Rev. 117, 136 (1922) (concluding that "the genesis of the modern doctrine of mens rea is . . . the mutual influences and

reactions of Christian theology and Anglo-Saxon law"). Indeed, the earliest reference to *mens rea* in English law appears to be "a scrap copied in from the teachings of the church." Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 983 (1932). Pentateuchal law, for example, distinguished between "ignorant" and "presumptuous" wrongs. Radin, 7 Encyclopaedia Soc. Sci. at 126. Because church teachings established that moral guilt should dictate punishment, and because mental culpability is essential to moral guilt, English criminal law began making *mens rea* "a factor of prime and decisive importance in the determination of criminal responsibility." Sayre, 45 Harv. L. Rev. at 988, 992-93.

By the late seventeenth century, English law universally accepted the maxim "that an evil intent was as necessary for [a] felony as the act itself." *Id.* at 993; *see also* Radin, 7 Encyclopaedia Soc. Sci. at 127. William Blackstone observed in the eighteenth century that a "vicious will" is necessary to constitute a crime. 4 William Blackstone, Commentaries *21; *see also* Ann Hopkins, *Mens Rea and the Right to Trial by Jury*, 76 Cal. L. Rev. 391, 394 (1988) (describing the "great deal of consensus" about the criminal intent requirement among the foremost English criminal law scholars of the eighteenth century); Radin, 7 Encyclopaedia Soc. Sci. at 129-30 (describing Enlightenment reformers as insisting on personal guilt, which necessarily required the presence of criminal intent).

Early American law incorporated and built on the *mens rea* requirement of English law. *Morissette*, 342

U.S. at 251-52 (the concept of crime as requiring the "concurrence of an evil-meaning mind with an evil-doing hand . . . took deep and early root in American soil"). As state legislatures codified common law crimes, state courts inferred the presence of *mens rea* requirements even where the statutes were silent. *Id.* at 252; *see also* Radin, 7 Encyclopaedia Soc. Sci. at 126-27 (observing that "mens rea is not so readily constituted from any wrongful act" in American law as elsewhere). This Court has recognized that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (alteration in original) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)).

As society evolved from a retributive theory of justice toward more modern penal theories of deterrence and rehabilitation, the importance of *mens rea* in criminal law increased in accordance with its centrality to those theories. *See* Radin, 7 Encyclopaedia Soc. Sci. at 129 (describing deterrence as the accepted penal theory of modern communities); *Morissette*, 342 U.S. at 251 n.5 (recognizing reformation and rehabilitation as important goals of criminal law). Under deterrence theory, punishment acts "against the will of the prospective offender" and thus can be "effective only if the offense is a matter which the will can control"—that is, an action intended by the actor. Radin, 7 Encyclopaedia Soc. Sci. at 129. Intent likewise is essential to rehabilitation theory, as "it is only the wicked will that can be the subject of correction and reformation." *Id.*;

see also Morissette, 342 U.S. at 251 n.5 (modern penological goals of reformation, rehabilitation, and fitting the punishment to the offender "would seem illusory if there were no mental element in crime").

Throughout these centuries of relevant history, *mens rea* requirements "restricted criminal punishment to those who were truly blameworthy and gave individuals fair notice of the law." Walsh & Joslyn, *Without Intent*, at x. By comparison, so-called "public welfare" offenses that "depend on no mental element but consist only of forbidden acts or omissions" are of relatively recent vintage. *Morissette*, 342 U.S. at 252-53; *see generally* Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933). But offenses that at least appear not to require scienter have been enacted at an accelerating rate.

For example, a 2010 study conducted by *amicus* NACDL in partnership with the Heritage Foundation found that over 57 percent of the 466 non-violent and non-drug criminal offenses considered by the 109th Congress included only a weak *mens rea* requirement—such as "us[ing] the terms 'knowingly' or 'intentionally' in a blanket manner or as part of the introductory language of the offense"—or none at all. Walsh & Joslyn, *Without Intent*, at 12, 35. The weak or absent *mens rea* requirements in proposed legislation "appear to be related to the reckless pace of criminalization" and absence of judiciary committee oversight, not necessarily congressional intent to eliminate the longstanding *mens rea* tradition. *Id.* at x; *see also* John S. Baker, Jr., *Revisiting the Explosive Growth of*

Federal Crimes, Heritage Foundation L. Memo. No. 26, at 1 (June 16, 2008) (estimating that, at the end of 2007, the U.S. Code included at least 4,450 federal crimes, of which 452 were added between 2000 and 2007).

Despite the decrease in clear *mens rea* requirements, this Court has been a bulwark against several recent attempts to interpret federal criminal statutes as criminalizing apparently innocent conduct. *See, e.g.*, *McFadden v. United States*, 135 S. Ct. 2298, 2302 (2015) (knowing manufacture, distribution, or possession with intent to distribute controlled substances requires proving the accused knew the substance, including an analogue, was a "controlled substance"); *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (prohibition against transmitting a threat requires subjective *mens rea* in communicating that threat); *Flores-Figueroa v. United States*, 556 U.S. 646, 647 (2009) (aggravated identity theft requires knowledge that the identification used without lawful authority belongs to another person). The same result is warranted here.

II. A "KNOWING" VIOLATION OF 18 U.S.C. § 922(G) REQUIRES KNOWLEDGE OF THE STATUS ELEMENT MAKING THE POSSESSION OF FIREARMS OR AMMUNITION ILLEGAL

The interpretation of federal criminal law is primarily a matter of statutory construction. Generally,

"[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). As such, "determining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" *Staples v. United States*, 511 U.S. 600, 605 (1994) (omission in original) (quoting *United States v. Balint*, 258 U.S. 250, 253 (1922)).

The statutory text provides "the starting place for [this] inquiry," but does not end it. *Id.* Rather, it is the well-recognized and fundamental principle "that a defendant must be 'blameworthy in mind' before he can be found guilty" that provides the background rule for construing intent requirements for criminal statutes. *Elonis*, 135 S. Ct. at 2009 (quoting *Morissette*, 342 U.S. at 252). Relying on the "background presumption of evil intent" arising out of the "common-law history of *mens rea*," this Court many times has "interpret[ed] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994) (citing *Morissette*, 342 U.S. 246; *Liparota*, 471 U.S. 419; *Staples*, 511 U.S. 600). These cases make clear that the strength of the presumption "that criminal statutes require some sort of *mens rea* for conviction" overrides the Court's ordinary resistance to "reading words or elements into a statute that do not appear on its face." *Elonis*, 135 S. Ct. at 2014-15 (Alito, J., concurring in part and dissenting in

part). Instead, "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Staples*, 511 U.S. at 605-06; *see also Gypsum Co.*, 438 U.S. at 436 ("[I]ntent generally remains an indispensable element of a criminal offense.").

Three interpretive principles that emerge from these background presumptions are particularly important to the question presented here. First, "courts ordinarily read a phrase in a criminal statute that introduces a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa*, 566 U.S. at 653. Second, this Court has emphasized that "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U.S. at 72; *see also Liparota*, 471 U.S. at 426 (1985) (presumption favoring a scienter requirement is particularly apt if a contrary construction would "criminalize a broad range of apparently innocent conduct"). Finally, although the rule of lenity is inapplicable where, as here, congressional intent to include a *mens rea* requirement can be discerned, it provides a final backstop preventing the subject statute from being interpreted as essentially a strict-liability offense. *See Liparota*, 471 U.S. at 427 ("[R]equiring *mens rea* is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971))).

1. When Congress prefaces the elements of an offense with a "knowing" requirement, courts apply that mental state to each material element. *Flores-Figueroa*, 556 U.S. at 562; *see also Liparota*, 471 U.S. at 420 n.1, 433 (holding that a statute penalizing anyone who "knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [law]" required proof that the accused "knew that his acquisition or possession of food stamps was in a manner unauthorized by the statute or regulations"); *X-Citement Video*, 513 U.S. at 68, 78 (holding that a statute prohibiting knowingly transporting, shipping, receiving, or distributing any visual depiction if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct requires proof the accused knew the sexually explicit nature of the material and the age of the performers).

This rule accords with the Model Penal Code, which is "one source of guidance upon which the Court has relied to illuminate questions" about *mens rea*. *Gypsum Co.*, 438 U.S. at 444. In promulgating the Model Penal Code, the American Law Institute "attempt[ed] to systematically clarify the criminal law, particularly the role played by the mental element" and "[c]ontinu[ed] the common law's process of focusing on precise states of mind." Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 Utah L. Rev. 635, 684-85. The Code responds in particular to a "pervasive ambiguity in definitions of offenses that

include a culpability requirement," which is "that it is often difficult to determine how many of the elements of the offense the [*mens rea*] requirement is meant to modify." ALI, Model Penal Code § 2.02(4), Explanatory Note. To provide a solution to that interpretive dilemma, the Code adopts a rule that:

> When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all material elements of the offense, unless a contrary purpose plainly appears.

Id. § 2.02(4). The broad applicability of this rule accords with the Code's "preference for subjective culpability," which "reflect[s] the common law traditions of several hundred years in assessing prima facie culpability in terms of nonnormative states of mind." Gardner, 1993 Utah L. Rev. at 684.

Applying a leading adverb to each subsequently listed element also generally reflects the most natural reading of statutory language. In *Flores-Figueroa*, for example, the Court found "strong textual reasons" to interpret language penalizing one who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" as extending only to one who "knows" the means of identification belongs to another person. 556 U.S. at 650; *see also id.* ("As a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as

applying to all the subsequently listed elements of the crime.").

Here, the statute similarly contains a *mens rea* requirement prefacing the elements of the offense. Congress provided in 18 U.S.C. § 924(a)(2) that only an individual who *knowingly violates* the prohibitions in Section 922(g) may be punished. Section 922(g) contains no separate intent requirement, but sets out the elements of the underlying offense, which are (1) the accused has a status listed in Section 922(g)(1)-(9); (2) the accused later possessed a firearm or ammunition; and (3) the possession was in or affecting interstate commerce. In combination, these statutes "introduce[ ] the elements of a crime with the word 'knowingly.'" *Flores-Figueroa*, 556 U.S. at 652. Ordinary principles of statutory interpretation therefore provide that the term "knowingly" should be applied to each material element. *Id.*

That the scienter requirement is contained in a separate statutory section than the elements of the offense does not diminish the strength of this interpretation. Section 924(a)(2) prohibits "*knowingly violating*" Section 922(g), and a violation of Section 922(g) can occur only if the status, conduct, and jurisdictional elements all are met. A natural grammatical reading thus would apply "knowingly" to each material element of the offense listed in Section 922(g). *See United States v. Games-Perez*, 667 F.3d 1136, 1144 (10th Cir. 2012) (Gorsuch, J., concurring in the judgment) (in Section 922(g), "Congress gave us three elements in a particular order" so "it makes no sense to read the word

'knowingly' as so modest that it might blush in the face of the very first element only to regain its composure and reappear at the second"). Further, the Court in *X-Citement Video* applied the term "knowingly" to phrases appearing in a different subsection. 513 U.S. at 68-73. By the same logic, "knowingly violating" a separate section should require knowledge of the material elements defined in that section. *See, e.g., United States v. Wilson*, 133 F.3d 251, 261 (4th Cir. 1997) (interpreting prohibition in Clean Water Act, 33 U.S.C. § 1319(c)(2)(A), against "knowingly violating" other sections to require knowledge of each element constituting the proscribed conduct); *United States v. Ahmad*, 101 F.3d 383, 390 (5th Cir. 1996) (same).

2. It is particularly vital that "knowingly" be applied to the status elements in Section 922(g)(1)-(9) because only that status transforms otherwise innocent—indeed, constitutionally protected—activity into felonious conduct. *See, e.g., Elonis*, 135 S. Ct. at 2011 (a mental state requirement must apply to the threatening nature of a communication because it comprises "the crucial element separating legal innocence from wrongful conduct" (quoting *X-Citement Video*, 513 U.S. at 73) (internal quotation marks omitted)); *X-Citement Video*, 513 U.S. at 72 (the "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct"); *see also Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 522 (1994) ("Even statutes creating public welfare offenses generally require proof that the defendant had knowledge of sufficient facts to alert

him to the probability of regulation of his potentially dangerous conduct.").

The Court confronted a similar question in *Staples v. United States*. 511 U.S. 600 (1994). At issue in *Staples* was whether a violation of 26 U.S.C. § 5861(d), which prohibits possessing an unregistered "firearm," requires proof that the accused knew the characteristics of the weapon that made it a "firearm" as defined by the statute. 511 U.S. at 602-04. Invoking the "long tradition of widespread lawful gun ownership by private individuals in this country," the Court observed that "guns generally can be owned in perfect innocence." *Id.* at 610-11. The array of regulations governing gun ownership was not sufficient reason to dispense with a *mens rea* requirement because the Court questioned "whether regulations on guns are sufficiently intrusive that they impinge upon the common experience that owning a gun is usually licit and blameless conduct." *Id.* at 613.

The Court had "little doubt" that the statute should not be interpreted to "impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of the weapons in their possession—makes their actions entirely innocent." *Id.* at 614-15.

The potential for a ten-year sentence confirmed the Court's conclusion that only individuals who *know* the circumstances bringing a weapon within the statute's ambit may be convicted for its violation. *Id.* at 616. The Court noted that only "small penalties" are

typically at issue in public welfare statutes dispensing with *mens rea* requirements. *Id.* at 616; *see also Morissette*, 342 U.S. at 256 (noting that courts considered the relatively small penalties for public welfare offenses in dispensing with *mens rea* requirements for those statutes). Because "dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct"—possessing a gun—"a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." *Staples*, 511 U.S. at 618.

For these reasons, the Court held that only someone with knowledge that a gun's features brought it within the scope of the prohibition may be convicted of a violation. *Id.* at 619; *see also Carter v. United States*, 530 U.S. 255, 269 (2000) (describing *Staples* as "interpret[ing] a federal firearms statute to require proof that the defendant knew that the weapon he possessed had the characteristics bringing it within the scope of the statute" for the purpose of "avoid[ing] criminalizing the innocent activity of gun ownership").

The reasoning in *Staples* applies with even stronger force here. Without knowledge of prohibited status, an individual accused under Section 922(g) also would know only that he or she possessed a firearm or ammunition, which is "usually licit and blameless conduct." *Staples*, 511 U.S. at 613. The penalty for violating Section 922(g) is as severe as the penalty in *Staples*: up to ten years of imprisonment and a fine. 18 U.S.C. § 924(a)(2). Unlike the statute in *Staples*, which lacked *any* prescribed *mens rea* requirement, here

Congress *expressly required* that a violation be committed "knowingly," providing stronger proof of congressional intent to require knowledge of all material elements.

Finally, since *Staples*, this Court has ruled that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Dist. of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Interpreting the statute to criminalize knowing possession of a firearm or ammunition without knowing the facts of one's status that makes the possession unlawful would allow criminal penalties to be imposed for the apparently innocent exercise of a constitutional right. Such an interpretation at minimum "would raise serious constitutional doubts." *X-Citement Video*, 513 U.S. at 78. Applying the foundational principle of *mens rea* to the status elements in Section 922(g) alleviates any need to confront those constitutional questions, accords with longstanding principles of statutory interpretation, and protects fundamental fairness by criminalizing only knowingly unlawful conduct.

3. Because traditional interpretive tools provide an affirmative answer to the question whether "knowingly" applies to the status elements in Section 922(g), the rule of lenity is unnecessary to decide this case. *Staples*, 511 U.S. at 619 n.17. But even if the Court deems the statute ambiguous, that "venerable rule" supports interpreting "knowingly" to apply to the status elements in Section 922(g). *United States v. Santos*, 553 U.S. 507, 514 (2008) (opinion of Scalia, J.).

The rule of lenity provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis*, 401 U.S. at 812). In doing so, it "not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed," but also "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514 (opinion of Scalia, J.).

Here, traditional principles of statutory construction establish congressional intent, as described above. But one who disagreed and sought guidance in legislative history would encounter uncertainty. Those jurists who wade into the legislative history of the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), the source of the applicable statutory provisions, have found "that the relevant legislative history is stocked with ample artillery for everyone." *Games-Perez*, 667 F.3d at 1144 (Gorsuch, J., concurring in the judgment); *compare, e.g.*, *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (en banc) (observing that "it is not clear from the legislative history of FOPA whether Congress intended to extend the term 'knowingly' to one or all of the substantive elements of each offense in § 922" but concluding "there is no suggestion that Congress intended to dispense with the judicial interpretation of § 922(g)(1)'s predecessor

statutes"), *with id.* at 613 (Phillips, J., concurring and dissenting) (review of legislative history "confirms what logic so strongly suggests: that Congress intended the 'knowingly' and 'willfully' language in amended § 924(a) to be read as imposing *mens rea* requirements upon all substantive offenses to which the § 924(a) penalties apply").

If any doubt remains after "recourse to traditional rules of statutory construction," the rule of lenity dictates that "the tie must go to the defendant." *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015); *Santos*, 553 U.S. at 514 (opinion of Scalia, J.). Applying this rule "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota*, 471 U.S. at 427. The petitioner has shown this statute to be at least ambiguous as to whether the government must prove that the accused knew of the status that made his otherwise innocent possession of firearms and ammunition unlawful. The rule of lenity requires any ambiguity to resolve in his favor.

III. THAT THE CRUCIAL ELEMENT OF THE OFFENSE IS THE STATUS OF THE ACCUSED HIMSELF DOES NOT PERMIT DISPENSING WITH *MENS REA*

Several courts of appeals tasked with interpreting Sections 924(a)(2) and 922(g) have brushed aside the traditional commitment to *mens rea* and the related

principles of construction adopted by this Court. Rather, they reasoned that the presumption favoring *mens rea* does not apply if the element at issue concerns the status of the accused himself. *See, e.g.*, Pet. App. 15a-17a; *United States v. Capps*, 77 F.3d 350, 353 (10th Cir. 1996); *Langley*, 62 F.3d at 607. There is no basis for such an exception, which undermines the well-established protection of *mens rea* and which precludes accused individuals from presenting evidence showing they were unaware of the circumstances making their otherwise innocent possession of firearms or ammunition unlawful.

1. Although felon-in-possession prosecutions are by far the majority under Sections 924(a)(2) and 922(g), individuals assigned numerous other statuses likewise are prohibited from possessing firearms or ammunition. These include being a fugitive from justice, being an unlawful user of or addicted to any controlled substance, being adjudicated as a mental defective or committed to a mental institution, being discharged from the Armed Forces under dishonorable conditions, having renounced one's citizenship, being subject to a restraining order, being convicted of a misdemeanor crime of domestic violence, being an alien admitted to the United Sates under a nonimmigrant visa, and—the status at issue here—being an alien illegally or unlawfully in the United States. 18 U.S.C. § 922(g)(2)-(9).

Basic principles of statutory construction require "knowingly" to be applied the same way to each status listed as a subsection of Section 922(g). *See Ratzlaf v.*

United States, 510 U.S. 135, 143 (1994) (recognizing that "a single formulation" should be construed "the same way each time it is called into play"); *United States v. Stein*, 712 F.3d 1038, 1041 (7th Cir. 2013) ("[T]here is no reason to think Congress intended 'knowingly' to mean different things for different subsections of § 922(g)."); *United States v. Butler*, 637 F.3d 519, 524 (5th Cir. 2011) (same); *United States v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988) (same).

For some subsections of Section 922(g), courts *have* applied the "knowing" requirement to the circumstances comprising the prohibited status. *See, e.g.*, *United States v. Bostic*, 168 F.3d 718, 723 (4th Cir. 1999) (rejecting due process challenge to 18 U.S.C. § 922(g)(8) conviction because defendant "was aware that he possessed a firearm" *and* "was also aware that he was subject to a domestic violence restraining order which included a finding that he represented a physical threat" to others "and prohibited him from abusing" them); *United States v. Allen*, No. 96-5694, 129 F.3d 1265 (6th Cir. 1997) (Tbl.) (evidence sufficient to show knowledge of involuntary commitment to a mental institution under 18 U.S.C. § 922(g)(4)); *United States v. Ballentine*, 4 F.3d 504, 506 (7th Cir. 1993) (conviction for possessing firearms while a fugitive requires "know[ing] that charges are pending against him, that he has refused to answer to those charges and that he has left the jurisdiction where the charges are pending"); *see also United States v. Cook*, 914 F.3d 545, 550-51 (7th Cir. 2019) (conviction for possessing firearms as an unlawful user of or addict to unlawful substances

not impermissibly vague in part because it requires "knowledge of the facts that constitute the offense"); *cf. United States v. Renner*, 496 F.2d 922, 926 (7th Cir. 1974) (under predecessor statute, conviction for possessing a firearm while being a person under indictment requires knowledge of the indictment). *But see, e.g., Butler*, 637 F.3d at 524 (knowledge of dishonorable discharge not required for conviction under 18 U.S.C. § 922(g)(6)).

Because "knowingly" applies identically to each prohibited status enumerated under Section 922(g), requiring knowledge of involuntary commitment or the facts underlying fugitive status means knowledge of the facts underlying unlawful presence in the United States likewise should be required. But if the judgment of the court of appeals is affirmed and punishment can be imposed without any showing that the accused *knew* his presence in the United States was illegal or unlawful, a wide swath of apparently innocent conduct would be punishable by up to ten years' imprisonment. Such a result runs counter to fundamental fairness and the longstanding role of *mens rea* as protection against punishment for unknowingly unlawful conduct.

2. The "purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction." *Morissette*, 342 U.S. at 263. But that purpose should not be imputed when "it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation." *Staples*, 511 U.S. at 616.

Here, the relevant conduct—possessing a firearm or ammunition—is not only innocent but constitutionally protected. *See Heller*, 554 U.S. at 592; *Staples*, 511 U.S. at 610-11. And although individuals with at least some of the statuses enumerated in Section 922(g) might reasonably anticipate heightened regulation of their firearm possession, they only can do so *if they have knowledge of their prohibited status*. *See United States v. Kitsch*, No. 03-cr-594, 2008 WL 2971548, at *5 (E.D. Pa. Aug. 1, 2008) ("Only a knowing felon can reasonably expect to be subject to additional regulation.").

Most people prosecuted for violations of Section 922(g) may well be aware of their prohibited status. But that supplies no reason to criminalize the innocent conduct of those who lack such awareness. Individuals who, for example, do not receive notice of dishonorable discharge, *see Butler*, 637 F.3d at 524; are told a conviction is a misdemeanor, not a felony; unknowingly leave the jurisdiction where charges against them are pending; or have the mistaken impression they were born in the United States when in fact they were brought here unlawfully by their parents should not face up to ten years in prison for possessing a firearm or ammunition. And at minimum they are entitled to make the case to the jury that they lacked knowledge of the circumstances that criminalized their otherwise innocent possession of a firearm.

This Court in other contexts has declined to dispense with *mens rea* requirements when the Government argues they make prosecution too *difficult*. *See*,

e.g., *Flores-Figueroa*, 556 U.S. at 656-57; *Staples*, 511 U.S. at 615 n.11. There is still less reason to dispense with *mens rea* where the accused's knowledge of his prohibited status may be easy to establish in the mine run of cases. And when such knowledge is difficult to establish, that suggests the accused may well be ignorant of "the crucial element separating legal innocence from wrongful conduct," *Elonis*, 135 S. Ct. at 2011—the exact scenario in which a scienter requirement is most needed. This is especially important for issues of immigration law, which is "complex" and "a legal specialty of its own." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

An individual facing up to ten years in prison for "knowingly" violating Section 922(g) must be allowed to argue to the jury that he in fact was unaware of the circumstances making his possession of firearms or ammunition unlawful.

CONCLUSION

For the foregoing reasons, the Court should interpret "knowingly" as applying to the status elements in 18 U.S.C. § 922(g). The judgment should be reversed.

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IN THE

Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF PETITIONER

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19 U.S.T. 6223, T.I.A.S. No. 6577 (1968) 5
Agency Information Collection Activities, 82 Fed. Reg. 24987 (May 31, 2017) 15
Black's Law Dictionary (5th ed. 1979) 4, 19
Boy Scouts of America, *Shooting Sports Program FAQs*, https://www.scouting.org/outdoor-programs/shooting-sports/shooting-faq/ 18

David Martinez, *I didn't know I was undocumented* (Dec. 30, 2014) https://www.cnn.com/2014/06/25/living/david-martinez-undocumented-immigrant-irpt/index.html 18

Donald Neufeld, Lori Scialabba, and Pearl Chang, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I)* (May 6, 2009), https://www.nafsa.org/uploadedFiles/uscis_consolidated_guidance.pdf?n=3976 ..... passim

Illinois Department of Natural Resources, *Youth License and Permits*, https://www.dnr.illinois.gov/lpr/pages/youthpermitsfees.aspx 18

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Policy Memorandum PM-602-1060.1: Accrual of Unlawful Presence and F, J, and M Nonimmigrants (Aug. 9, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf..... 4, 7, 17

Total number of current I-821 Temporary Protected Status (TPS) individuals as of November 29, 2018, https://www.uscis.gov/sites/default/files/files/native documents/Total_number_of_current_I-821_Temporary_Protected_Status_TPS_individuals_as_of_November_29_2018.xlsx 14
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U.S. Immigration and Customs Enforcement, *Reinstatement SEVIS User Guide* https://studyinthestates.dhs.gov/sites/default/files/Reinstatement%20User%20Guide_0.pdf 17
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INTEREST OF THE AMICUS CURIAE

Amicus National Immigrant Justice Center (NIJC) is a non-profit legal service provider that represents immigrants and asylum-seekers. NIJC collaborates with more than 1500 pro bono attorneys to represent thousands of immigrants and asylum-seekers annually. NIJC also advises federal defenders and defense counsel on immigration matters relevant to their clients. NIJC represents hundreds of noncitizens whose presence is "authorized" by statute and pursuant to agency rule, but whose precise "status" under the law is unclear.[1]

SUMMARY OF THE AMICUS ARGUMENT

Under the Court's case law, whether immigration rules are "confusing" appears relevant to the *mens rea* calculus for 18 U.S.C. § 922(g)(5)(A). Amicus therefore writes to outline some of the complexities of immigration law as it would affect this matter.

Amicus begins by describing three related but distinct concepts under immigration laws relating to the legality of a noncitizen's presence "in" the United States. Unlawful presence, as defined in statute and elaborated in agency guidance, refers to whether a noncitizen is *authorized* to remain in the United States. Criminalized presence refers to circumstances where Congress has authorized punishment for a noncitizen's entry into, or presence within, the United

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[1] Pursuant to Rule 37.6 of the rules of this Court, amicus affirms that no counsel for a party authorized this brief in whole or in part and that no person other than amicus and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to this filing have been submitted to the Clerk.

States. The third concept—the one advanced by the Government—focuses on the concept of "status," i.e., whether a noncitizen is in a formal legal status in the United States. Status can be unlawful even where the noncitizen's presence is not criminalized, and where the stay is authorized by the agency, by statute, or by regulation.

Amicus explains a number of aspects of the Government's proposed approach that are particularly confusing. Authorized stays do not constitute lawful "status" even where those stays are permitted by statute and consciously allowed by the agency. Minor differences between generally indistinguishable situations can change a status from lawful to unlawful, or vice versa. Even long-term, functionally-permanent stays authorized by statute do not confer lawful status under the agency's rules (while less-permanent circumstances do). Moreover, agency rules allow immigration status to be granted or withdrawn retroactively, with as-yet unknown effects on criminal liability in the meantime. These complexities do not arise in unusual or rare circumstances; each of the situations outlined in the brief affect thousands to hundreds of thousands of individuals annually. Finally, Amicus explain that noncitizens are often innocently unaware of crucial facts that affect their legal status and could subject them to liability.

Amicus suggests that the Court may wish to consider alternative constructions for the "illegally or unlawfully in" element of § 922(g)(5)(A), because those alternatives would better accord with common linguistic usage and various principles of construction. Lenity principles also support that approach. The Government's approach imposes criminal liability for failure

to follow an agency's civil rules. Under the Court's case law, this is permissible only where Congress has spoken clearly. Here, where Congress did not explicitly make § 922(g)(5)(A) liability turn on adherence to agency rules or compliance with agency orders, precedent suggests that the statute not be read to do so implicitly. At a minimum, this line of cases supports Petitioner's view that any violation of agency rules must be knowing to trigger criminal liability.

In sum, the legality of a noncitizen's status or stay is often unclear, and even more frequently misunderstood. That is enough under the Court's precedent to require the Government to prove that any violation was "knowing" in order to subject them to criminal punishment.

ARGUMENT

I. AS INTERPRETED BELOW THE "ILLEGALLY OR UNLAWFULLY IN" ELEMENT IS CONFUSING IF NOT AMBIGUOUS.

The firearms statute prohibits possession by noncitizens who are "*illegally or unlawfully in* the United States." 18 U.S.C. § 922(g)(5)(A) (emphasis added). Amicus writes to explain that this text is—as understood by the lower court—confusing if not actually ambiguous. There are many circumstances that are unclear even to immigration lawyers.

A. "Illegal or unlawful" in this context could mean at least three distinct things.

Amicus sees at least three distinct ways in which the "illegally or unlawfully" element of § 922(g)(5)(A) might be understood.

First, § 922(g)(5)(A) could refer to the legality of "presence." The statute refers to someone being "in"

the United States. The word "in" is "an elastic preposition... expressing *presence*, existence, situation, inclusion, action." BLACK'S LAW DICTIONARY 683 (5th ed. 1979) (emphasis added). The Immigration and Nationality Act (INA) contains a definition of "unlawful presence." *See* 8 U.S.C. § 1182(a)(9)(B)(ii) (defining "unlawful presence").[2] Indeed, the lower court cited § 1182(a)(9)(B) in its decision. *U.S. v. Rehaif*, 888 F. 3d 1138, 1148 (11th Cir. 2018).

The unlawful presence definition excludes some categories of persons, including minors, asylum applicants, and victims of domestic abuse and human trafficking. *See* 8 U.S.C. § 1182(a)(9)(B)(iii). Moreover, unlawful presence is construed to exclude any "period of stay authorized by the Attorney General." 8 U.S.C. § 1182(a)(9)(B)(ii). Based on this exclusion, certain pending applications and situations keep a noncitizen from falling into unlawful presence.[3] For instance, a noncitizen who applies for asylum or other forms of relief is often permitted to remain inside the United States pending a decision, because Congress has

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[2] Unlawful presence is defined in 8 U.S.C. § 1182(a)(9)(B)(ii) "[f]or purposes of [that] paragraph." *Id.*

[3] The Agency designates some circumstances as a "period of stay authorized by the Attorney General," 8 U.S.C. § 1182(a)(9)(B)(ii), which are thereby excluded from and cannot constitute "unlawful presence" under § 1182(a)(9). *See generally* Donald Neufeld, Lori Scialabba, and Pearl Chang, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I)* (May 6, 2009), https://www.nafsa.org/uploadedFiles/uscis_consolidated_guidance.pdf?n=3976, modified in part by USCIS *Policy Memorandum PM-602-1060.1: Accrual of Unlawful Presence and F, J, and M Nonimmigrants* 1 (Aug. 9, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf.

granted her the right to seek that relief. *See* 8 U.S.C. § 1158(a)(1) (asylum).[4] She would not accrue unlawful presence during the pendency of the application. (This would not protect her from detention at the discretion of the agency. 8 U.S.C. § 1226(a).)

Second, the statute could be construed as referring to criminalized presence, i.e., where a noncitizen's entry or presence violates the criminal law. Acts that are criminal in nature fit naturally within the meaning of "illegal or unlawful." *See, e.g.*, *Cordova-Soto v. Holder*, 659 F.3d 1029, 1034 (10th Cir. 2011) (finding procedurally proper entry "illegal" because counter to criminal law). Under the INA, entries "without inspection" (and certain other types of entries and presence) subject noncitizens to criminal prosecution. *See* 8 U.S.C. §§ 1325(a) (illegal entry), 1326 (illegal reentry). Notably, it is not a violation of federal criminal code for a noncitizen like Mr. Rehaif to remain in the United States longer than (or other than) permitted by a visa.[5]

The Government argues for a third approach, which focuses on legal "status." Regulations cited by the lower court adopt this approach. *See Rehaif*, 888 F. 3d at 1148; 27 C.F.R. § 478.11 ("Aliens who are unlawfully in the United States are not in valid immigrant, nonimmigrant or parole *status*.") (emphasis added).

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[4] This is both an expression of the nation's principles and a fulfillment of national treaty obligations. See 8 U.S.C. § 1231(b)(3); 19 U.S.T. 6223, 6259–6276, T.I.A.S. No. 6577 (1968); *see generally INS v. Stevic*, 467 U.S. 407, 416-17 (1984).

[5] Proposals to criminalize failure to timely depart after a nonimmigrant entry, *see Visa Overstay Enforcement Act of 2017*, H.R. 643, 115th Cong. § 2, have failed.

The Department of Homeland Security (DHS) distinguishes between "unlawful presence" and "unlawful status."

> DHS may permit an alien who is present in the United States unlawfully, but who has pending an application that stops the accrual of unlawful presence, to remain in the United States while that application is pending. In this sense, the alien's remaining can be said to be "authorized." However, the fact that the alien does not accrue unlawful presence does not mean that the alien's presence in the United States is actually lawful.
>
> **** [S]ome aliens who are actually present in an unlawful *status*, are, nevertheless, protected from accruing unlawful presence.

Donald Neufeld, Lori Scialabba, and Pearl Chang, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I)* 9, 10 (May 6, 2009), https://www.nafsa.org/uploadedFiles/uscis_consolidated_guidance.pdf?n=3976 (emphasis in original) (hereinafter "*Consolidation of Guidance*"), modified in part by USCIS *Policy Memorandum PM-602-1060.1: Accrual of Unlawful Presence and F, J, and M Nonimmigrants* 1 (Aug. 9, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf.[6]

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[6] Indeed, the *Consolidation of Guidance* used an example close to the case at bar:

> An alien is admitted for "duration of status" as an F-1 nonimmigrant student. year later, the alien drops out of school, and

But the status question is not uncomplicated. For instance, a noncitizen who unlawfully entered the United States might thereafter be granted asylum, which would place her in lawful status. *See* 8 U.S.C. § 1158. Or, she might be granted withholding of removal, which prevents removal to the country in which persecution is feared. 8 U.S.C. § 1231(b)(3); *INS v. Stevic*, 467 U.S. 407, 421-24 (1984). As explained *infra* at 9-10, withholding is probably not considered lawful status by the agency.

Or a noncitizen may be granted Temporary Protected Status (TPS). DHS considers TPS to be lawful status. *Consolidation of Guidance* 27 ("If an alien's TPS application has been granted, the alien is deemed to be in lawful nonimmigrant status for the duration of the grant."). The Fifth Circuit agrees, finding that a noncitizen in TPS status cannot be prosecuted under § 922(g)(5)(A). *U.S. v. Orellana*, 405 F. 3d 360 (5th Cir. 2005); *compare U.S. v. Flores*, 404 F.3d 320 (5th Cir. 2005) (finding mere application for TPS did not grant status). It is not clear if all federal agencies agree with

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remains in the United States for one year after dropping out. The alien's status became unlawful when she dropped out of school. Neither USCIS nor an IJ ever makes a finding that the alien was out of status; therefore, she never accrues any unlawful presence for purposes of section 212(a)(9)(B) of the Act.... [T]he alien did not accrue unlawful presence despite the prior unlawful status, and so the alien is not inadmissible under section 212(a)(9)(B) of the Act."

Consolidation of Guidance 10-11. USCIS abrogated this part of the *Consolidation of Guidance*, citing in part the lower court's decision in this case. *Policy Memorandum PM-602-1060.1: Accrual of Unlawful Presence and F, J, and M Nonimmigrants, supra*, 2 n.2. Now, a student like Mr. Rehaif would begin to accrue unlawful presence immediately upon falling out of student status. *Id.*

this approach; the Board of Immigration Appeals (BIA) finds TPS consistent with entry of an order of removal. *Matter of Sosa-Ventura*, 25 I. & N. Dec. 391, 396 (B.I.A. 2010). At any rate, courts do not treat all temporary status like TPS; most temporary relief is not considered to be lawful status. *See Hussein v. INS*, 61 F.3d 377, 381 (5th Cir. 1995) (temporary stay of removal not a legal status); *United States v. Bazargan*, 992 F.2d 844, 848-49 (8th Cir. 1993) (employment authorization did not convey legal status). Whatever the merits of the agency's views on individual forms of relief, its answers are not instinctive or obvious (and less so for an unrepresented noncitizen).

To summarize, at least three distinct concepts address illegality of a noncitizen's stay in the United States. The unlawful *presence* definition turns largely on whether a noncitizen's stay is "authorized" or permitted. The *criminal* rules generally makes presence or entries unlawful where noncitizens enter without inspection. A noncitizen's legal *status* turns on the technical nature of the noncitizen's presence under the agency's rules and procedures. The lower court appeared to adopt the third approach, or an amalgam of the first and third approaches.

B. The confusing nature of immigration "status" or "presence" would support a *mens rea* requirement.

The Court generally presumes a scienter requirement for "each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). Given that firearm possession is otherwise licit, the legality *vel non* of status or presence appears less like a juris-

dictional fact and more like something that "separate[s] those who understand the wrongful nature of their act from those who do not." *Id.* at 73 n.3.

However, the Court has found that the presumption of a scienter requirement carries less force when there is little "opportunity for reasonable mistake" about the element. *X-Citement Video*, 513 U.S. at 72 n. 2. Thus, the Court may find it relevant to consider the likelihood that a noncitizen may be mistaken as to the legality of their status or presence.

1. Authorized stay does not constitute lawful status.

It is sometimes clear whether a noncitizen is in lawful or unlawful status; but not always. For instance, even semi-permanent authorized stays are considered not to convey lawful "status" under the INA.

- Noncitizen A enters the United States without inspection and thereafter seeks asylum. His asylum claim is denied, but he is granted withholding of removal under 8 U.S.C. § 1231(b), because he is recognized to meet the refugee definition at 8 U.S.C. § 1101(a)(42)(A). He thereafter resides in the United States for a dozen years.

A noncitizen who enters this country without inspection immediately begins to accrue unlawful presence. 8 U.S.C. § 1182(a)(9)(B). Unlawful presence would stop during the pendency of a bona fide asylum application. 8 U.S.C. § 1182(a)(9)(B)(iii)(II); *Consolidation of Guidance* 29-30. The grant of withholding of removal would be considered a period of stay authorized by the Attorney General; Noncitizen A would thus accrue no unlawful presence after that grant. *Consolidation of Guidance* 42-43. However, withholding is not

considered lawful status by DHS; indeed, an order of removal must be entered at the time of the withholding grant. *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 434-35 (B.I.A. 2008). Withholding does not convert into a more permanent status with the passage of time, nor do the regulations authorize withholding grantees to be issued travel documents. 8 C.F.R. §§ 223.1(b), 223.2(b)(2).

By contrast, a noncitizen in lawful "status" is considered to retain that status until a final order is entered terminating it. *Matter of Lok*, 18 I. & N. Dec. 101, 106-07 (B.I.A. 1981); 8 C.F.R. § 1001.1(p). Noncitizens who have not yet naturalized may be subject to removal for a wide variety of reasons. *See* 8 U.S.C. § 1227. If Noncitizen B obtains asylum, she is in lawful status, but may thereafter commit acts rendering her removable. For instance, Noncitizen B might pay a smuggler to facilitate the unlawful entry of her father, which would trigger removability under 8 U.S.C. § 1227(a)(1)(E). Even if Noncitizen B were amenable to removal from the United States, she would continue to be in lawful "status" until a final administrative removal order would be entered, after all appeals. *Lok*, 18 I. & N. Dec. at 106-07.

The fact that Noncitizen A's right to remain in the U.S. appears more secure than Noncitizen B's is—or so argues DHS—irrelevant to his legal status.

2. Situations that appear similar are treated differently.

The agency also makes distinctions that might appear unexpected. Cases that appear fundamentally similar are often treated differently.

For instance, consider a relatively common example.

- Noncitizen C enters the United States on a tourist visa, falls in love and gets married. She files an application for permanent resident status before her nonimmigrant status expires. See 8 U.S.C. § 1255(a). *Consolidation of Guidance* 10 (Example 2).

If Noncitizen C's application for permanent residence is granted, she assumes lawful status at that point. Even before then, she would accrue no unlawful presence while her application for permanent residence status is pending. *Consolidation of Guidance* 33-34. However, DHS would consider her to be in unlawful status upon expiration of her initial period of admission. *Id.* at 10.

By contrast, a small change in the example would result in a different answer.

- Noncitizen D is like Noncitizen C. But while her permanent residency application is pending, she obtains "advance parole" to briefly travel abroad to visit her mother who is sick. *See* 8 C.F.R. §§ 212.5(f), 245.2(a)(4)(ii)(A). On return, she is paroled into the United States on return to await adjudication of her application for permanent residency.

Noncitizen D, like Noncitizen C, did not accrue unlawful presence. But unlike Noncitizen C, by being paroled upon her return, she entered into a form of status. *See* 27 C.F.R. § 478.11 (referring to "parole"). While Noncitizen D and Noncitizen C may wait an equal time for adjudication of their residency applications, with the same likelihood of approval, Noncitizen C would be in unlawful "status" during that time, though both C and D were equally known to the Government and in otherwise equivalent positions.

3. Long-term stays authorized by statute and/or explicit agency decisions are not considered lawful "status."

DHS would reach this result even where statute or regulations authorize long-term stays, and where an agency action has explicitly approved them.

- Noncitizen E enters the United States on a tourist visa while still a minor. She becomes a victim of human trafficking. She eventually escapes and testifies against her smugglers, and is sponsored by a law enforcement agency for a "U visa" as a victim of specified crimes. 8 C.F.R. § 214.14(c)(2)(i). She is found eligible for a U visa, but due to annual quotas on U visas, she cannot be immediately granted a U visa until it is her turn in line. 8 C.F.R. § 214.14(d)(2). By regulation, while she waits her turn for a U Visa, she is granted deferred action and work authorization. 8 C.F.R. § 214.14(d)(2).

Noncitizen E would not accrue unlawful presence during her minority. 8 U.S.C. § 1182(a)(9)(B)(iii)(I). By regulation, individuals on the U visa "wait list" do not accrue unlawful presence. 8 C.F.R. § 214.14(d)(2). If Noncitizen E can show a connection between the trafficking or abuse and her entry, she might be able to avoid accruing any unlawful presence at all. 8 U.S.C. §§ 1182(a)(9)(B)(i)(IV), (V). However, until she is granted U visa status, her deferred action and work authorization do not place her into lawful "status" in DHS's eyes. The fact that Congress has explicitly authorized DHS to stay removal for people like her, 8

U.S.C. § 1227(d)(1), does not matter under DHS's analysis. *Consolidation of Guidance* 6-7 (listing stay grants under header of "Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence").

This analysis applies regardless of the length of the stay, or the strength of the noncitizen's claims.

- Noncitizen F is brought to the United States as a young child, entering without inspection. After graduating high school and college, she seeks and is granted deferred action under the Deferred Action for Childhood Arrivals (DACA) program. *See Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 411-17 (E.D.N.Y. 2018) (describing history of DACA). She is also granted work authorization and is able to obtain post-graduation employment. Her employer files a visa petition on her behalf. She marries a U.S. citizen, who files a second visa petition for her.

Noncitizen F may be working with authorization and may appear headed toward permanent lawful status, but this is not relevant under the DHS calculus. Under that approach, her deferred action does not count as a status, so she remains in unlawful status.

4. Status can be restored or withdrawn retroactively.

Moreover, status is not necessarily fixed in time. In some circumstances, the immigration authorities approve or mandate retroactive shifts in status.

- Noncitizen G, a citizen of Canada, lawfully enters the United States as a nonimmigrant, not requiring a visa. She files an application for an extension or change of status before

> her initial status expires. 8 U.S.C. § 1258(a). It is pending for several months, during which time she goes to a shooting range. The extension application is approved some months later.

A timely extension motion is understood to prevent the noncitizen from accruing "unlawful presence"; and if the extension is granted, it retroactively confers lawful "status" through the earlier application point. *Consolidation of Guidance* at 37-38.

Legal liability under § 922(g)(5)(A) is thought to turn on whether the noncitizen was in lawful status *at the time* of the firearm possession. *See Orellana*, 405 F. 3d at 366. In this example, Noncitizen G could presumably, under the Government's view, be indicted for having a firearm. But Noncitizen G would appear to be absolved of liability by intervening agency action if the extension request is approved.

5. These ambiguities affect many thousands of people.

The examples outlined above are not unusual examples or "eggshell skull" cases. The number of people in the categories above ranges from thousands to the millions. These are not rare cases.

Temporary Protected Status currently covers over 417,000 individuals from 10 countries. *See* USCIS, *Total number of current I-821 Temporary Protected Status (TPS) individuals as of November 29, 2018*, https://www.uscis.gov/sites/default/files/files/native-documents/Total_number_of_current_I-821_Temporary_Protected_Status_TPS_individuals_as_of_November_29_2018.xlsx. Over 650,000 people apply every year for adjustment of status like Noncitizen C.

USCIS, *Agency Information Collection Activities*, 82 Fed. Reg. 24987, 24988 (May 31, 2017). Hundreds of thousands of people apply for advance parole, most while seeking permanent resident status, like Noncitizen D. *USCIS Advance Parole Documents: Fiscal Year 2016 Report to Congress* 2 (Jan. 6, 2017) ("USCIS received approximately 300,000 applications for advance parole documents each year. The majority of requests for advance parole documents comes from individuals seeking adjustment of status.").

Over 2,120,000 people have been granted deferred action under the DACA program since 2012, like Noncitizen F. *See* USCIS, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake and Case Status Fiscal Year 2012-2018* (September 30, 2018), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performance_data_fy2018_qtr4.pdf.

Even the less frequent examples above would affect many thousands of noncitizens.

The Government does not provide a precise number of people on the U visa waitlist, like Noncitizen E, but it is at least "thousands" and the waiting period is "years." USCIS Ombudsman, *Parole for Eligible U Visa Principal and Derivative Petitioners Residing Abroad* 1 (June 16, 2016), https://www.dhs.gov/sites/default/files/publications/cisomb-u-parole-recommendation-061616.pdf. For the past several years, over a thousand noncitizens have been have been granted withholding of re-

moval annually, like Noncitizen B. *See* U.S. Department of Justice, Executive Office for Immigration Review, *Statistics Yearbook FY2017*, 27 fig. 22.

In sum, these ambiguous situations are not freak occurrences affecting only isolated cases. They are almost the norm. True, many noncitizens enter without inspection and are never allowed to apply for lawful status; and other noncitizens enter in lawful immigrant or nonimmigrant status, and always maintain that status. It is not that legality of status or presence is *always* unclear, but that it is *often* unclear.

* * *

Even if DHS's specific analyses of status questions is not flawed in application, its calculus is confusing and complicated. Cases might look similar to the untrained eye, but be treated differently by the agency. DHS's understanding of status does not directly correlate to a noncitizen's likelihood to permanently remain in the United States with government permission.

C. Noncitizens are often ignorant about important aspects of their case.

It may also be relevant to consider the degree to which reasonable noncitizens would understand their actual legal situations. The ferocious complexity of the immigration statutes intersects with an affected populace that is often unrepresented and unlikely to fully and correctly understand those intricacies.

Courts have long recognized the complexity of the immigration laws. *See Lok v. Immigration & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977) (noting "the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete"); *Castro-O'Ryan v. U.S. Dep't*

of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.' A lawyer is often the only person who could thread the labyrinth.") (citation omitted). As illustrated above, only the thinnest of lines distinguishes between noncitizens who are allowed to remain in the United States in unlawful status, and those considered to be in proper status. That line is sometimes hard to discern even immigration attorneys; it is impossible for many unrepresented noncitizens.

As a concrete example, when Petitioner was admitted into the country, his passport was marked "D/S." Brief of Petitioner 4. This notation means "duration of status." *See USCIS Policy Memorandum PM-602-1060*, *supra*, at 1. An immigration attorney would know the significance of "D/S": that any change in Mr. Rehaif's education plans would affect his legal status. A noncitizen like Mr. Rehaif likely would not understand this notation (and what it signifies) unless someone explained it to him. Given that most nonimmigrants are not represented by counsel, *cf. Castro-O'Ryan*, 847 F.2d at 1312, ignorance about important legal rules is the rule rather than the exception. Knowledge gaps become particularly acute when something relatively complex comes to pass; for Petitioner that occurred when he dropped out of school.[7]

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[7] Petitioner might have sought reinstatement of his status; a 20 page guide can explain the process. U.S. Immigration and Customs Enforcement, *Reinstatement SEVIS User Guide* https://studyinthestates.dhs.gov/sites/default/files/Reinstatement%20User%20Guide_0.pdf.

Of course, ignorance of important data points does not always turn on the statute's complexity. Individual noncitizens might lack awareness of basic facts relevant to their citizenship status for any number of reasons. For instance, it is common for noncitizens brought to the U.S. as young children to discover that they lack U.S. citizenship when they are in high school or when it is time to apply to college. *See, e.g.*, David Martinez, *I didn't know I was undocumented* (Dec. 30, 2014) https://www.cnn.com/2014/06/25/living/david-martinez-undocumented-immigrant-irpt/index.html. It is thus possible that an undocumented youth could accidentally violate § 922(g)(5)(A) if there is no mens rea requirement. Firearms use is not unpopular this country; states grant youth hunting permits. *See* Illinois Department of Natural Resources, *Youth License and Permits*, https://www.dnr.illinois.gov/lpr/pages/youthpermitsfees.aspx. Youth organization such as the Boy Scouts have activities that involve firearms, such as target ranges at summer camps. See Boy Scouts of America, *Shooting Sports Program FAQs*, https://www.scouting.org/outdoor-programs/shooting-sports/shooting-faq/. A middle school student in a scout camp would be unlikely to be federally prosecuted. But it bears noting that if there is no mens rea applicable to the legality of presence, a youth would technically violate the federal gun statute by participating in these activities, in perfect ignorance that he was a noncitizen.

II. LIMITING INTERPRETATIONS NOT INVOLVING MENS REA MIGHT AMELIORATE THESE QUESTIONS.

Amicus would note—though neither party has raised it—that the statute might be construed in ways that would substantially reduce these difficulties. As

Amicus explained *supra* at 3-8, the "illegally or unlawfully" language could be understood in multiple ways. The government argues that a noncitizen's "status" is determinative, but the other options fit at least as well with the statutory text.

First, Congress premised the crime on whether a noncitizen is "illegally or unlawfully *in*" the United States. 18 U.S.C. § 922(g)(5)(A) (emphasis added). The word "in" is generally understood to involve presence. BLACK'S LAW DICTIONARY 683 (5th ed. 1979) ("an elastic preposition... expressing presence"). By contrast, the word "status" involves a "state or condition," and implicates "the legal relation of individual to rest of the community." *Id.* at 1264. Looking only at the text, the legality of "presence" would seem more directly relevant than the legality of "status" to the word "in."

The unlawful presence definition in the statute tends to turn on authorization granted by the federal government for a noncitizen to remain in the United States. This seems to Amicus to fit better with the ordinary and common understanding of being "illegally in" this country, since it would exclude situations when the federal government has officially and explicitly, after due legal proceedings, allowed a noncitizen to remain inside in this country. It seems strange to treat such noncitizens as not lawfully here when they have "increase[d their] identity with our society" by those means permitted by Congress in statute. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

Alternately, the statutory text would better accord with an understanding that § 922(g)(5)(A) applies to criminalized presence. This would generally mean entries without inspection. 8 U.S.C. §§ 1325(a), 1326. Understanding the text that way would avoid notice

problems; a noncitizen who has entered without inspection would generally know of this fact, and would—absent acquisition of some lawful status—understand her presence in the United States to be premised on non-detection. Moreover, applying § 922(g)(5)(A) to noncitizens who enter without inspection would avoid overlap with the prohibition of nonimmigrant entrants possessing firearms. *See* 18 U.S.C. § 922(g)(5)(B). As noted *supra* at 5 at n.5, overstaying a valid nonimmigrant visa, or failing to adhere to the terms of that visa, is not criminal under the INA. Under this alternative approach, the two prongs of § 922(g)(5) would apply to non-overlapping sets. The statute would apply neatly to bar gun ownership in § 922(g)(5)(A) to individuals who entered the U.S. without inspection (unless they thereafter obtain legal permission to remain) and at § 922(g)(5)(B) to those who enter on nonimmigrant visas. This simpler view of the statute would eliminate many or most difficult of the mens rea questions otherwise posed by the statute.

Even if the text of the statute did not require either of these readings, the canon of lenity would support one of these alternate understandings. Under that well-known rule, an ambiguous criminal statute must be construed narrowly, in favor of the accused. *See United States v. Bass*, 404 U.S. 336, 347 (1971). The illegal "status" concept broadens criminal liability and may not always provide "fair notice to those subject to the criminal laws." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). This is out of keeping with jurisprudence of long standing, which requires "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U. S. 25, 27 (1931). Because these

alternate constructions are plausible, and would better accord with these principles, the Court may choose to resolve this case on those alternate grounds.

III. FAILURE TO FOLLOW AGENCY RULES IS NOT CRIMINAL UNLESS EXPLICITLY MADE SO IN STATUTE.

The ordinary corollary for complex and ambiguous laws administered by agencies is deference to agency interpretations. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005). But federal prosecutions are the province of Article III courts, not administrative agencies. *Gomez v. United States*, 490 U.S. 858, 876 (1989); *see also Wong Wing v. United States*, 163 U.S. 228 (1896). This creates a tension: "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014).

It is true that Congress may premise criminal liability on violating an agency's rules and regulations. *See United States v. Grimaud*, 220 U.S. 506 (1911) (illegal to violate regulations issued by the Secretary of Agriculture); *Touby v. United States*, 500 U.S. 160 (1991); *United States v. O'Hagan*, 521 U.S. 642 (1997). But criminal liability attaches only where Congress speaks clearly; it does not attach "where a statute does not distinctly make the neglect in question a criminal offense." *United States v. Eaton*, 144 U.S. 677, 688 (1892).

Congress could certainly make a § 922(g)(5)(A) violation turn on violation of agency rules. For instance, 8 U.S.C. § 1324a(f)(1) imposes criminal liability for employment of noncitizens not authorized by the Attorney General to be employed, under certain circumstances. *See* 8 U.S.C. § 1324a(h)(3); *see also* 8 U.S.C. §

1326(a)(2) (imposing criminal liability for reentry unless Attorney General "expressly consents" to the reentry). But § 922(g)(5)(A) makes no reference to agency rules or decision-makers. A generic reference to being lawfully "in" the United States is not sufficient to impose liability for violating an agency's rules; "[r]egulations... may... have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense." *Eaton*, 144 U.S. at 688.

Moreover, the Government's theory would make criminal violations turn on agency rules and interpretations about status, interpretations that are not fixed in stone. The Government's theory "would allow one administration to criminalize conduct..., the next administration to decriminalize it, and the third to recriminalize it, all without any direction from Congress." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring). If Congress wishes to adopt that approach in § 922(g)(5)(A), it may do so, but it must say so clearly.

Since Congress has not spoken clearly to impose § 922(g)(5)(A) punishment on violation of civil immigration rules, these principles suggest that the Court should adopt an interpretation of the statute which does not depend on the agency's regulatory or subregulatory rules. But at a minimum, these principles would seem to require the Government to prove that an individual knows of their status violation in order to subject them to criminal punishment.

CONCLUSION

Immigration law is rarely simple. Applying the agency's view of when immigration "status" is lawful

implicates confusing and unclear questions, matters about which defendants might reasonably be unsure. This is sufficient to require a mens rea requirement. Moreover, the Government's view would appear to require deferring to the agency's views on status, in the absence of an explicit statutory statement to that effect. Amicus sets forth two alternate constructions which might simplify judicial inquiries under § 922(g)(5)(A). The Court may wish to consider adopting one of those limiting constructions, as well as requiring a knowing *mens rea* as to the question presented in the case.

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